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No.

In the Supreme Court of the United States

THE NAVELLIER SERIES FUND, a Delaware Business Trust; THE AGGRESSIVE SMALL CAP EQUITY PORTFOLIO OF THE NAVELLIER PERFORMANCE FUND, a Delaware Business Trust,

Petitioners,

v.

KENNETH SLETTEN, an individual and former Trustee of The Navellier Series Fund,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether trustees of federally regulated mutual funds can be indemnified by the mutual funds they serve for amounts they did not actually lose, through the assertion of state "collateral source" rules (which allow insurance proceeds to be excluded from the calculation of damages), or do §§1(b)(2), 17(h), 36, 37 and 47(b)(1) of the Investment Company Act [15 U.S.C. §§80a-1(b)(2), 17(h), 35, 36 and 46(b)(1)] (which prohibit mutual fund trustees from benefitting at the expense of the mutual fund) preempt and prevent mutual fund trustees from obtaining double recoveries from their mutual funds.

PARTIES TO THE PROCEEDINGS

The parties to this petition are the same as those listed on the caption.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. THE NINTH CIRCUIT MISAPPREHENDED THE PREEMPTION OF THE INVESTMENT COMPANY ACT OF 1940 8

II. THE QUESTION OF ICA PREEMPTION IS AN ISSUE OF NATIONAL IMPORTANCE . . 11

A. The Ninth Circuit Decision Seriously Hinders The Effective Administration of the ICA 11

III. THE NINTH CIRCUIT SHOULD, AT A MINIMUM, HAVE CERTIFIED THE COLLATERAL SOURCE QUESTION TO THE DELAWARE SUPREME COURT 16

IV. THE NINTH CIRCUIT DECISION IS INCORRECT 17

CONCLUSION 23

APPENDIX

Appendix A: 5/10/06 Ninth Circuit Order 1a

Appendix B: 3/22/06 Ninth Circuit Memorandum . . 3a

Appendix C: 5/26/05 District Court of Nevada Order 6a

Appendix D: 5/26/05 District Court of Nevada Judgment in a Civil Case 17a

Appendix E: 9/17/02 District Court of Nevada Order 19a

Appendix F: Excerpts of Declaration of Trust of The Navellier Series Fund 27a

Appendix G: Trustee Indemnification Agreement . 31a

Appendix H: 3/30/00 District Court of Nevada Complaint for Indemnity and for Declaratory and Injunctive Relief - Jury Demand 34a

Appendix I: 10/11/01 District Court of Nevada Amended Answer and Counterclaim 46a

TABLE OF AUTHORITIES

Albertson's, Inc. v. Kirkingburg,
527 U.S. 555 (1999) 13

Bramalea California, Inc. v. Reliable Interiors, Inc.,
119 C.A. 4th 465 (2004) 13, 20

Brown v. Nationwide Mutual Ins. Co.,
574 A.2d 841 21

Burks v. Lasker, 441 U.S. 471 (1979) . . . . . *passim*

C.L. Maddox v. Benhom Group, Inc.,
88 F.3d 592 . . . . . 14, 15

Compagnie des Banafites de Guinee v. Hammermill, Inc.,
1992 WL 122712, *9 n.6 (D.D.C.) 15

Donkoff v. Bowling Proprietors Association,
331 N.Y.S. 2d 109 (N.Y. Sup. Ct. 1972) 15

J.J. White v. Metropolitan Merchandise Mart,
107 A.2d 892 (Del. 1934) 20, 22

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 17

Mitchell v. Haldar, 883 A.2d 32 (Del. Supr. 2005) . . . 19

Navellier v. Sletten, 262 F.3d 923 (9th Cir. 2001) 4

Onusko v. Kerr, 880 A.2d 1022 (Del. Supr. 2005) 18

Parents Involved In Community Schools v. Seattle School District No. 1,
294 F.3d. 1285-1286 . . . . . 16, 17

Riofrio Anda v. Ralston Purina Co.,
959 F.2d 1149 (1st Cir. 1992) 22

Rothensies v. Electric Battery Co.,
329 U.S. 296 (1946) 13

Royal Insurance Company of America v. Whitaker Contracting Corp.,
242 F.3d 1035 (11th Cir. 2001) 17

Schneider v. National Railroad Passenger Corp.,
987 F.2d 132 (2nd Cir. 1993) 14

Sears, Roebuck and Co. v. Midcap,
2006 WL 58278 (Jan. 9, 2006) 19

Sletten v. The Navellier Series Fund,
276 F. Supp. 2d 1067 (D. Nev. 2003) 1, 6

Smith v. American Medical Systems,
876 F.2d 434 (5th Cir. 1989) 17

Solo Electric Co. v. Jefferson Co.,
317 U.S. 173 (1942) 15

State Farm Mutual Auto Ins. v. Nalbone,
569 A.2d 71 (Del. 1989) . . . . . *passim*

United States v. City of Twin Falls, Idaho,
806 F.2d 862 (9th Cir. 1986) 14

W&G Seaford Associates L.P. v. Eastern Share Markets, Inc.,
714 F. Supp. 1336 (D. Del. 1989) 19, 20

Yarrington v. Thornburg,
205 A.2d 1 (Del. Spur. 1964) 18

Regulations

Indemnification by Investment Companies, September 4, 1980, 20 S.E.C. Docket 1342, Release No. IC-11330, WL 27386 . . . . . 3, 12

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. B) is unreported. The District Court decision is unreported. The District Court decision initially granting summary judgment which was incorporated into the District Court's comprehensive judgment is unreported. The District Court decision setting the amount of indemnity is reported at Sletten v. The Navellier Series Fund, 276 F. Supp. 2d 1067 (D. Nev. 2002).

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered March 22, 2006 (App. B). The Court of Appeals entered an order denying a timely petition for rehearing and suggestion for rehearing en banc on May 10, 2006 (App. A). This Court has jurisdiction to review on a writ of certiorari the judgment of a federal court of appeal pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

In 1940, Congress enacted the Investment Company Act of 1940 ("ICA") [15U.S.C. §80a-1 et seq.] to regulate widespread abuses in the mutual fund industry.

Section 1b(2) of the ICA [15 U.S.C. §80a-1b(2)] provides in pertinent part:

> ...the interests of investors are adversely affected – (2) when investment companies are ... operated... in the

> interest of directors... rather than in the interest... of security holders.

Section 1b of the ICA further provides:

> It is... the policy and purpose of this title... to mitigate and... to eliminate the conditions... which adversely affect... the interest of investors.

Section 17(h) of the ICA [15 U.S.C. §80a-17(h)] provides in pertinent part:

> ...neither the charter... indenture of trust... nor any other instrument pursuant to which such a [investment] company is organized or administered, shall contain any provision which protects or purports to protect any director... against any liability to the company... to which he would otherwise be subject by reason of willful malfeasance, bad faith... or reckless disregard of the duties involved in the conduct of his office.

Section 36(a) of the ICA [15 U.S.C. §80a-35(a)] provides in pertinent part:

> The Commission is authorized to bring an action... alleging that a person serving in one... of the following capacities has engaged... in a breach of fiduciary duty... in respect of any registered investment company for which such person... serves.. (1) as director...
>
> ...
>
> If such allegations are established, the court may... award such... relief against such person as may be... appropriate... having due regard to the protection of

> investors and to the effectuation of the policies detailed in Section 1(b) of this title.

Section 37 of the ICA [15 U.S.C. §80a-36] provides in pertinent part:

> Whoever... unlawfully and willfully converts to his own use... moneys... or assets for any registered investment company shall be guilty of a crime.

Section 47(b)(1) of the ICA [15 U.S.C. §80a-46(b)(1) provides in pertinent part:

> A contract... whose performance involves a violation of this title, or any rule, regulation or order thereunder, is unenforceable by either party... unless a court finds that under the circumstances enforcement would produce a more equitable result... and would not be inconsistent with the purposes of this title.

The Securities and Exchange Commission's Investment Company Release No. 11330 [IC Release 11330] provides in part:

> The staff believes than an improper indemnification payment or advance of legal expenses could constitute a breach of fiduciary duties involving personal misconduct under Section 36 [15 U.S.C. §80a-35] or unlawful and willful conversion of an investment company's assets under Section 37 of the Act [15 U.S.C. §80a-36].

STATEMENT OF THE CASE

The Petitioners in this case are the Navellier Series Fund, a federally regulated investment company (mutual fund) organized as a Delaware business trust, and its successor in interest, the Aggressive Small Cap Equity Portfolio of the Navellier Performance Funds, a separate series of a mutual fund also organized as a Delaware business trust. Petitioners are collectively referred to herein as "Navellier."

The Respondent is Kenneth Sletten ("Sletten"), an individual and citizen of California, who formerly was a trustee of the Navellier Series Fund.

The jurisdiction of the district court was invoked by Sletten under 28 U.S.C. §1332 because of diversity of citizenship, Sletten being a citizen of California and the Navellier mutual funds each being a citizen of Delaware. Sletten also invoked federal jurisdiction "under 28 U.S.C. §1331 (Federal Question) because Plaintiff's claims arise from his services as an independent trustee of an investment company under the Investment Company Act of 1940" (App. H, p. 35a)

In 1997, Sletten and two other trustees of the Navellier Series Fund terminated the Navellier Series Fund's investment advisor. Some of the Fund's investors brought a class action suit in California federal court against Sletten and two other trustees for terminating the investment advisor.

A jury denied recovery on the Navellier Series Fund's claims. The Ninth Circuit Court of Appeals affirmed. Navellier v. Sletten, 262 F.3d 923 (9th Cir. 2001) cert. den. 536 U.S. 941 rehearing den. 536 U.S. 982 (2002).

While the appeal to the Ninth Circuit was pending, Sletten filed a contract action for indemnity against Petitioners ("Navellier") in the United States District Court for Nevada seeking, as damages, $1.5 million for the attorneys fees and costs he had allegedly "incurred" in defending against Navellier's California federal court action. Sletten did not reduce his $1.5 million indemnity claim by the $1.3 million he admitted he had already received from insurance to reimburse him for those attorneys fees. (App. H) Navellier filed counterclaims asserting that Sletten's indemnity claim was a sham because he was seeking damages for losses he knew he had not sustained. (ER 16), (App. I, pp. 55a-67a)

Navellier defended against Sletten's indemnity action, principally on the grounds that 1) Sletten had no damages because he had been reimbursed by insurance; 2) that Delaware's so called "collateral source rule," which allows the victim of a tortfeasor to disregard receipt of insurance payments in asserting damages, does not apply in determining contract damages and 3) even if it did, state collateral source rules conflict with, and are preempted by, provisions of the Investment Company Act which prohibit a fiduciary (trustee) of a federally regulated mutual fund from profiting from or improperly obtaining assets of the mutual fund he/she serves.

Sletten moved for summary judgment, which the District Court granted, holding that, under Delaware's collateral source rule, Sletten's indemnity claim would not be offset or reduced by the reimbursements he received from homeowner's insurance. (App. E, p. 24a)

The District Court, after a remand from the Ninth Circuit (instructing the District Court to decide Navellier's counterclaims), sua sponte entered summary judgment denying Navellier's counterclaims and incorporated its prior

decision awarding Sletten $2.3 million consisting of $1.1 million for attorneys fees he had already been reimbursed for by homeowners insurance plus $400,000 in prejudgment interest on amounts he had already been reimbursed for by insurance plus $800,000 in new attorneys fees for bringing the indemnity action. Sletten v. The Navellier Series Fund, 276 F. Supp. 2d 1067 (D. Nev. 2003).[1] The $2.3 million award constituted 72% of the Navellier Fund's total assets.

Navellier timely appealed the District Court's judgment and other orders to the Ninth Circuit Court of Appeals, again arguing that the state collateral source rule did not apply to a breach of indemnity contract case and moreover even if it did, application of a state collateral source rule conflicts with and is preempted by the provisions of the Investment Company Act enacted to prohibit a mutual fund fiduciary from profiting at the expense of the mutual fund he/she serves. (AOB,[2] pp. 34-35; ARB, pp. 15-20; APR, pp. 16-18).

On March 22, 2006, the Ninth Circuit affirmed the indemnity judgment in favor of Sletten, holding in pertinent part:

> The Fund appeals the district court's decision awarding indemnification to Sletten for fees and costs

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[1] The District Court had previously also imposed a $2.7 million prejudgment freeze on the $3.2 million in Navellier investors' assets. The Ninth Circuit reversed that order as a violation of this Court's decision in Grupo Mexicano de Desarrollo, S.A. v. Allegience Bond Fund, Inc., 527 U.S. 308 (1999) (App. B, p. 5a)

[2] "AOB" refers to Navellier's Ninth Circuit Opening Brief. "ARB" refers to Navelliers Ninth Circuit Third Brief on Cross-Appeal. "APR" refers to Appellants' Petition for Rehearing.

> he incurred defending a lawsuit the Fund brought against him. Sletten's homeowners' insurance company reimbursed him for most of these expenses. The Fund argues that this reimbursement means that Sletten suffered no indemnifiable loss within the meaning of the applicable indemnification agreements. The agreements, however, do not address the issue of whether Sletten can collect indemnity for expenses covered by a collateral source. Contrary to the Fund's claim, Delaware law allows him to do so under the circumstances in this case. See State Farm Mutual Auto Ins. v. Nalbone, 569 A.2d 71, 75 (Del. 1989). None of the Fund's other arguments requires a different result. (Emphasis added.)

Navellier petitioned for rehearing and rehearing en banc arguing that 1) because the issue of whether Delaware's collateral source rule applied to a breach of contract claim had never been decided by the Delaware Supreme Court, the Ninth Circuit should certify the question to the Delaware Supreme Court before rendering a decision and 2) that even if the collateral source rule applied in a breach of contract damage claim, a state collateral source rule could not be applied to a mutual fund trustee's claim for indemnity because it was preempted by sections of the Investment Company Act and SEC Releases issued thereunder. (APR, pp. 16-18)

On May 10, 2006, the Ninth Circuit Court of Appeals refused to certify the collateral source issue to the Delaware Supreme Court and denied Navellier's petition for rehearing and rehearing en banc. (Appendix A.)

REASONS FOR GRANTING THE PETITION

This case presents an important preemption issue of first impression, i.e., whether various state collateral source rules, which allow tort victims double recovery, can be asserted by trustees of federally regulated mutual funds to circumvent provisions of the Investment Company Act [15 U.S.C. §§80a-1(b)(2), 17(h), 35, 36, 46] which prohibit mutual fund trustees from acting in a way that profits themselves at the expense of the mutual fund they serve. The question of whether federally regulated mutual funds have to indemnify their fiduciaries for losses they did not sustain or whether the ICA prohibits such "indemnity" is a question that affects virtually all mutual funds. The Ninth Circuit's decision requiring such indemnity conflicts with the prohibitions of the ICA. This Court should settle the issue.

I. THE NINTH CIRCUIT MISAPPREHENDED THE PREEMPTION OF THE INVESTMENT COMPANY ACT OF 1940

Navellier respectfully submits that even if, arguendo, the Ninth Circuit was correct in holding that Delaware's collateral source rule applies to allow double indemnity in a breach of contract case, its decision misapprehended the preemption of the Investment Company Act provisions which prohibit a trustee from making a profit at the expense of the mutual fund he/she serves.

Section 1(b)(2) of the ICA prohibits mutual fund trustees from acting in their own interests "rather than in the interest... of security holders." [15 U.S.C. §80a-1(b)(2)]. Section 1(b) of the ICA further provides that the purpose of the ICA is to eliminate conditions which adversely affect the interests of investors.

State collateral source rules (which, if applied, would allow a plaintiff trustee to profit at the expense of his/her mutual fund by recovering damages against the mutual fund he/she serves for monies he/she did not actually lose) directly conflict with the ICA prohibition against operating a mutual fund in the trustee's interest rather than the interest of the investors.

Section 17(h) of the ICA [15 U.S.C. §80a-17(h)] prohibits mutual funds from agreeing to protect a director (trustee) from liability to which he/she would otherwise be subject by reason of bad faith or reckless disregard of his/her duties. A trustee's assertion of a state collateral source rule in order to require a mutual fund to pay the trustee damages, for losses he/she admittedly did not sustain, is bad faith and directly conflicts with the ICA provision precluding a mutual fund from indemnifying trustees for their bad faith or reckless disregard of their duties. It is no different than if the trustee sought reimbursement for a phony expense claim.

Section 36(a) of the ICA [15 U.S.C. §80a-35a] makes a trustee liable for breaching his/her fiduciary duty to the mutual fund he/she serves. Section 37 of the ICA [15 U.S.C. §80a-36] makes it a crime for a trustee to unlawfully or willfully convert mutual fund monies or assets to his/her own use. A trustee's assertion of a state collateral source rule which allows a mutual fund trustee to obtain money from a mutual fund to compensate him/her for losses he/she did not really sustain is a breach of the trustee's fiduciary duty to act in the best interests of the mutual fund's shareholders and is a willful conversion of mutual fund assets. Such state collateral source rules directly conflict with §§36 and 37 of the ICA specifically enacted to prevent trustees from taking mutual fund monies for their own benefit.

Section 47(b)(1) of the ICA [15 U.S.C. §80a-46(b)(1)] invalidates contracts, which, when performed, violate the ICA or any rules or regulations promulgated thereunder. Applying a state collateral source rule to an indemnity contract between a trustee and his/her mutual fund so as to allow the trustee to obtain monies from the mutual fund for losses the trustee did not actually sustain, violates the above sections of the ICA which prohibit a trustee from profiting at the expense of the mutual fund or converting mutual fund monies to his/her own use.

Where state laws conflict with the ICA by allowing mutual fund trustees to do what is prohibited by the ICA, the ICA preempts the state law. As this Court held in Burks v. Lasker, 441 U.S. 471, 478-479 (1979), the Investment Company Act ("ICA") "imposes controls and restrictions on the internal management of investment companies. It displaces state laws which [otherwise would] allow directors [trustees] to do what is prohibited by the ICA."

The Ninth Circuit's decision allows trustees "to do what is prohibited by the ICA." It's determination that Delaware's collateral source rule allows Sletten, the former trustee of a federally regulated mutual fund, to profit by obtaining indemnity for $1.3 million in losses he did not actually sustain, directly conflicts with the ICA's prohibition against trustees obtaining improper indemnifications.[3] The ICA

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[3] The Ninth Circuit also overlooked the fact that the indemnity agreement specifically provided that if the terms of the indemnity agreement conflicted with federal securities laws, the indemnity provision would be void. (ER 16.) (App. H, p. 29a) Therefore, double recovery under the collateral source rule was prohibited.

displaces state collateral source law and renders the Ninth Circuit decision erroneous.

II. THE QUESTION OF ICA PREEMPTION IS AN ISSUE OF NATIONAL IMPORTANCE

A. The Ninth Circuit Decision Seriously Hinders The Effective Administration of the ICA

The issue of whether varying state collateral source rules can be applied to allow the trustees of federally regulated mutual funds to profit at the expense of the mutual funds shareholders they have a fiduciary duty to protect is of exceptional national importance.

There are 7,991 open end mutual funds in the United States with 91 million investors. These mutual funds manage 9.3 trillion dollars of assets. Fifty-three million households representing 47.5% of all U.S. households are invested in those mutual funds. These mutual funds are organized under the laws of nearly every state. Thirty-five of those states have statutory or common law collateral source rules which vary from state to state.

The trustees or directors of those mutual funds are charged under the ICA with overseeing the overall operations of the mutual fund with a duty to protect the interests of the mutual fund investors. Burks v. Lasker, supra 441 U.S. at 484-485.

It is standard practice in the mutual fund industry for mutual funds to provide indemnity to their trustees for attorneys fees and costs in the event the trustees are sued for actions taken in their capacities as trustees. The provision of indemnity for the trustees creates a tension between

conflicting policies of the ICA. On the one hand, the ICA was enacted so that the trustees have overall responsibility for watching over the interests of the investors. In order for mutual funds to attract people willing to carry out this watchdog function, they are entitled to be indemnified for their actual costs in acting as trustees. On the other hand, the ICA prohibits the trustees from benefiting at the expense of the mutual funds they serve. Providing the trustees with indemnity for their actions could be construed as benefiting the trustees at the expense of the mutual funds they serve. IC Release No. 11330.

The Securities and Exchange Commission, which is charged with administering the ICA and promulgating rules and regulations to carry out the ICA's purposes and policies, has issued releases on two occasions attempting to strike a balance between protecting the trustees and protecting the investors. In striking that balance, the SEC has allowed mutual funds to provide limited indemnity to their trustees, but has made clear its opinion that mutual fund trustees cannot use such indemnity agreements as a means to receive payments in breach of their fiduciary duties or to convert the mutual fund's assets. Thus, in IC Release No. 11330, the SEC explained:

> "The staff believes than an improper indemnification payment or advance of legal expenses could constitute a breach of fiduciary duties involving personal misconduct under Section 36 [15 U.S.C. §80a-35] or unlawful and willful conversion of an investment company's assets under Section 37 of the Act [15 U.S.C. §80a-36]." (Emphasis added.)

A trustee who receives an indemnity payment for a loss he/she did not sustain is receiving an improper indemnification.

Certiorari is necessary because the Ninth Circuit's decision in this case, allowing trustees to assert state collateral source rules in order to obtain double recoveries for indemnity claims against their mutual funds, eviscerates this long standing SEC policy and contradicts the prohibitions of the ICA. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 561-562 (1999). The Ninth Circuit decision creates a serious hindrance to the effective administration of the ICA. Rothensies v. Electric Battery Co., 329 U.S. 296 (1946).

The Ninth Circuit's construction of Delaware's collateral source rule - to allow a trustee of a federally regulated mutual fund to make a windfall profit from the mutual fund he/she is duty bound to protect - misapprehends and is in direct conflict with, the ICA's prohibition against trustees' conversion of a mutual fund's assets. It destroys the uniform regulation of mutual fund fiduciaries and replaces it with a patchwork of varying and conflicting state collateral source rules which make regulation and enforcement of mutual fund indemnity provisions a function of state law rather than the Investment Company Act and eviscerates the prohibitions of the ICA.

There are collateral source rules in approximately 35 states. Those collateral source rules vary from state to state. For example, under California law, the collateral source rule (allowing a double recovery) does not apply to breach of contract claims for indemnity. Bramalea California, Inc. v. Reliable Interiors, Inc., 119 Cal. App. 4th 465, 473 (2004):

> Bramalea admits its attorney fees were entirely paid for by Zurich and it has suffered no out-of-pocket

> loss. Thus, any recovery it might receive from the subcontractors would be a prohibited double recovery... the collateral source rule applies to tort damages, not to damages for breach of contract.... This is due to the fundamental differences between tort and contract damages.... "The collateral source rule is punitive; contractual damages are compensatory. The collateral source rule, if applied to an action based on breach of contract, would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance."... (Emphasis Added)

Likewise, Idaho does not allow double recovery in contract cases. United States v. City of Twin Falls, Idaho, 806 F.2d 862, 873-874 (9th Cir. 1986). Nor does Connecticutt. Schneider v. National Railroad Passenger Corp., 987 F.2d 132, 138-139 (2nd Cir. 1993). In Schneider, the court refused to allow indemnity for attorneys' fees where the attorneys' fees had been paid for by insurance:

> [Plaintiff] has not spent one cent out of its own pocket to defend itself in this litigation. A party is not entitled to recover costs when no costs have been incurred.

Nor does Missouri. C.L. Maddox v. Benhom Group, Inc., 88 F.3d 592, 604-605:

> Maddox presented no evidence whatsoever that it actually reimbursed BBI for the sums expended by EEI. Although Maddox presented evidence that EEI looked to Maddox for reimbursement, until Maddox actually reimbursed EEI, it has suffered no concrete damages. For example, should EEI have sued Maddox for these sums (rather than collecting on the

> performance bond), it is conceivable that Maddox could have interposed a successful defense against EEI and be adjudged not liable to EEI. Until Maddox has paid the costs or has been adjudged liable for these costs, any damages to Maddox are merely speculative and contingent, and hence not recoverable. Id at 604

However, according to the Ninth Circuit's decision,[4] Delaware's collateral source rule does allow double recovery (Appendix B, p. 4a) citing State Farm Mutual Auto Insurance Co. v. Nalbone, 569 A.2d 71, 75 (Del. 1989).

According to trustee Sletten, New York also allows double recovery. Donkoff v. Bowling Proprietors Association, 331 N.Y.S. 2d 109 (N.Y. Sup. Ct. 1972) as does the District of Columbia. Compagnie des Banafites de Guinee v. Hammermill, Inc., 1992 WL 122712, *9 n.6 (D.D.C.)

If these varying state collateral source rules are allowed to govern mutual fund trustees' indemnity claims rather than the ICA, there will be no uniformity in the regulation of mutual fund trustees and the "prohibition of [the] federal statute would be eviscerated, i.e., "set at naught." Burks v. Lasker, supra 441 U.S. at 480 n. 6 quoting Solo Electric Co. v. Jefferson Co., 317 U.S. 173, 176 (1942).

Certiorari is necessary to have a definitive review and published opinion as precedent to guide mutual fund practitioners, trustees and shareholders as to the limits and extent that trustees can be indemnified and to create

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[4] Petitioners respectfully submit the Ninth Circuit's construction of Delaware law is incorrect. See infra at pp. 17-23.

uniformity nationwide, so that various state law collateral source rules do not improperly create different standards for indemnification of mutual fund trustees depending on the state in which the federally regulated mutual fund is organized.

Certiorari should be granted because the Ninth Circuit has, by its decision in this case, decided this important issue of federal law, i.e., that state collateral source rules are not preempted by the ICA. That issue of national importance to the entire mutual fund industry has not been decided by this Court. This Court should decide this matter so that the issue of whether the ICA provisions preempt state collateral source rules can be settled.

III. THE NINTH CIRCUIT SHOULD, AT A MINIMUM, HAVE CERTIFIED THE COLLATERAL SOURCE QUESTION TO THE DELAWARE SUPREME COURT

The Ninth Circuit based its decision on the application of perceived Delaware collateral source law rather than application of the federal law of the ICA. The Ninth Circuit should have, at a minimum, certified to the Delaware Supreme Court this unsettled question of the applicability of the collateral source rule to a breach of contract claim.

This is a case of first impression. There are no Delaware Supreme Court cases or other Delaware cases which hold that the collateral source rule is applicable to a breach of contract case. Navellier respectfully submits that before this novel construction of Delaware case law was applied to a federally regulated mutual fund in this very unsettled area of Delaware collateral source case law, the Ninth Circuit should have certified the question to the Delaware Supreme Court for its guidance in determining what Delaware law is, particularly since it is determinative of the outcome in this case. Parents

Involved In Community Schools v. Seattle School District No. 1, supra 294 F.3d at 1285-1286; Smith v. American Medical Systems, 876 F.2d 434, 435 (5th Cir. 1989) [certification to Texas Supreme Court to determine whether seller entitled to indemnification for attorneys fees under Texas law]; Royal Insurance Company of America v. Whitaker Contracting Corp., 242 F.3d 1035, 1043 (11th Cir. 2001) [certification to Alabama Supreme Court to determine whether, under Alabama law, an indemnification agreement to cover liability for non-delegable duty had to specifically state that it covered such duty].

Certiorari should be granted to determine whether the Ninth Circuit should have certified the collateral source issue to the Delaware Supreme Court before ruling. Lehman Brothers v. Schein, 416 U.S. 386 (1974).

IV. THE NINTH CIRCUIT DECISION IS INCORRECT

In addition to not applying the prohibitions of the ICA and not following Burks v. Lasker supra to hold that a conflicting state law is preempted by the provisions of the ICA, the Ninth Circuit erred in holding that Delaware collateral source law[5] allows a mutual fund trustee to be reimbursed even though he/she suffered no indemnifiable loss. (App. B, p.4a)

Delaware's collateral source rule does not apply to breach of contract cases. It has only been applied in tort cases.

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[5] The Ninth Circuit's erroneous construction of Delaware state law regarding the applicability of the collateral source rule to indemnity contracts is especially important because a great number of mutual funds are organized under Delaware's Business Trust laws.

The rule was set forth in Delaware over 40 years ago in Yarrington v. Thornburg, 205 A.2d 1 (Del. Spur. 1964). It finds "classic application in an action brought by an injured party against a tortfeasor." (Emphasis added.) State Farm Mutual Automobile Ins. Co. v. Nalbone, 569 A.2d 71, 73 (Del. Supr. 1989).

The Delaware Supreme Court held in Yarrington supra 205 A.2d at 2:

> The collateral source doctrine is predicated upon the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the defendant. (Emphasis added.)

The rationale for Delaware's collateral source rule is "to emphasize the deterrent and quasi-punitive functions of tort law." It is better that an "innocent plaintiff receive a windfall than a wrongdoing defendant bear less than the full cost of his negligent conduct." (Emphasis added.) State Farm Mutual supra at 73.

The Delaware courts have consistently restricted the application of the collateral source rule to tort cases [i.e., refused to deduct insurance proceeds from the calculation of damages]. Refinement or extension of the collateral source rule in Delaware has been limited to tort cases.

Thus, in Onusko v. Kerr, 880 A.2d 1022, 1024 (Del. Supr. 2005), the Delaware Supreme Court allowed a double recovery (for discounted medical charges) against a negligent automobile driver, holding that the "collateral source rule provides that a tortfeasor may not benefit from any money the

injured party may receive from sources other than the tortfeasor." (Emphasis added.)

Likewise, in Mitchell v. Haldar, 883 A.2d 32, 37-38 (Del. Supr. 2005), the Delaware Supreme Court ruled in a medical malpractice case that a tortfeasor has no interest in and therefore no right to benefit from monies "received by the injured person from sources unconnected with the defendant," and that the "rationale for the collateral source rule is based upon the quasi-punitive nature of tort law liability." (Emphasis added.) The Delaware Supreme Court went on to explain, relying on Virginia case law, that the "collateral source rule is designed to strike a balance between two competing principles of tort law..." (Emphasis added.) Id at 38.

Most recently, the Delaware Supreme Court, in Sears, Roebuck and Co. v. Midcap, 2006 WL 58278 (Jan. 9, 2006), held that under Delaware's collateral source rule, "a tortfeasor has no interest in monies that the injured party receives from an unrelated source..." However, the Delaware Supreme Court, relying on California case law, held it was an error under Delaware's collateral source rule for the trial court to exclude evidence of pension benefits the victim's estate received from social security and military pensions when the victim's estate was seeking to recover those benefits from the tortfeasor. The Delaware Supreme Court refused to allow a double recovery and held that the "defendants must be permitted to show that those [pension] payments actually were or will be received. Id.

In W&G Seaford Associates L.P. v. Eastern Share Markets, Inc., 714 F. Supp. 1336, 1350 (D. Del. 1989), the court refused to extend Delaware's collateral source rule to a breach of contract case. There, the landlord sued the tenant

for breach of a commercial lease. The prospective tenant sought to offset payments the landlord received from a subsequent tenant. The landlord argued that payments it received from the prior tenant were collateral source and should not be offset. The court refused to extend the collateral source rule to a breach of contract claim. It offset the other rent payments against the contract damages claimed by the landlord.

The collateral source rule, which applies to tort damages, does not apply to breach of contract cases because of the fundamental difference between tort and contract damages:

> "The collateral source rule is punitive; contractual damages are compensatory. The collateral source rule, if applied to an action based on breach of contract, would violated the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance..." (Emphasis added.)

Bramalea California, Inc. v. Reliable Interiors, Inc., (2004) 119 Cal. App. 4th 468, 473; Restatement Second, Contracts, §347, Comment e.

Delaware applies the same contractual damage rule. J.J. White v. Metropolitan Merchandise Mart, 107 A.2d 892, 894 (Del. 1934):

> One who is injured by the breach of a contract is entitled to compensation for the injury received. The compensation should be such as will place him in the same position that he would have been in if the contract had been performed. The measure of damages is the loss actually sustained as a result of the breach of the contract. (Emphasis added.)

Accord, W&G Seafood Associates, supra 714 F. Supp. 1337 at 1348.

Likewise, the State Farm Mutual Auto Ins. Co. v. Nalbone, case, 569 A.2d 71 (Del. Supr. 1989) does not support the Ninth Circuit's decision. The Nalbone case was also a tort case.

In Brown v. Nationwide Mutual Ins. Co., 574 A.2d 841, a woman injured in an auto accident was paid sixty percent of her salary by her employer's wage continuation program. She sued her insurer, seeking to recover the full amount of her salary, even though she had already received sixty percent of her salary. The Delaware Supreme Court refused to apply the collateral source rule to exclude the sixty percent. Relying on Nalbone, the court stated:

> In Nalbone, we held that the collateral source rule is properly a doctrine of tort law and that it is unwarranted to expand its reach and apply it against a no-fault insurer whose obligations stem not from tort liability, but rather from contractual provisions and the duties imposed by 21 Del. C. §2118. Thus, under section 2118 a no-fault insurer is not obligated to compensate its insured for wages not actually lost. (Emphasis added.)

The Nalbone decision was limited to the interplay between 21 Del. Code §2118 and the obligations of a no fault insurer. It did not hold that insurance payments, even if paid for by the insured (not our case), are excluded in determining contract damages.

In Nalbone, the court looked to the policy goals of the Delaware no fault auto insurance statute and determined that

the goal was compensation for actual losses. Thus, even though the insured paid for her no fault auto insurance, since she received full compensation from her employer's wage continuation plan for which she had not paid, she was not entitled to double recovery from her insurance carrier because she had no out of pocket loss. Nalbone supra 569 A.2d 71 at 75. The court also noted in dicta that if a risk-averse insured contracts for double recovery and pays both auto and health insurance premiums, he has paid twice for the expected loss due to injury and therefore should be permitted a double recovery since that is what he paid for. Id at 75.

The court went on to hold that no statutory authority was required to deny recovery for losses which did not in fact occur or expenses not in fact sustained. Id at 76. The court held that to do so would sanction a windfall to the insured by adding a fault based doctrine (tort collateral source) to a no fault system. Id at 75.

The Navellier Funds did not, and could not, as a matter of law, contract to pay its trustee a double recovery for losses he did not sustain. In fact, the indemnity agreement which was an integrated agreement specifically provided that Sletten would only be "indemnified" for "losses sustained."(App. G, p. 31a.) There was no provision in the contract to disregard insurance payments received by Sletten in calculating the actual loss sustained.

In fact, the contract law of damages in Delaware and elsewhere requires that the plaintiff in a breach of contract action is only entitled to actual losses. J.J. White, supra at 894; Riofrio Anda v. Ralston Purina Co., 959 F.2d 1149, 1153 (1st Cir. 1992) ["it is beyond cavil that a party must suffer actual loss before it is entitled to damages"].

During oral argument and in its decision, the Ninth Circuit raised the proposition that since the indemnity agreement does not address whether Sletten can collect indemnity for expenses covered by a collateral source, he is allowed to exclude them for the calculation of his loss. Respectfully, that is incorrect and overlooks both the law in Delaware and the specific language of the indemnity agreement which provides that Sletten will only be indemnified for losses he sustains. (App. G, p. 31a) The $1.3 million he received from insurance to reimburse him for attorneys fees reduced the loss (if any) he sustained. Awarding him damages for losses he did not sustain gives him a $1.3 unlawful profit at the mutual fund's expense.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Plaintiffs-Appellants

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-16126
D.C. No. CV-00-00167-LRH
District of Nevada, Reno

[Filed May 10, 2006]

KENNETH SLETTEN, an individual and former Trustee of the Navellier Series Fund,	)
Plaintiff- Appellee,	)
v.	)
NAVELLIER SERIES FUND, a Delaware Business Trust; AGGRESSIVE SMALL CAP EQUITY PORTFOLIO OF THE NAVELLIER PERFORMANCE FUNDS, a Delaware Business Trust,	)
Defendants- Appellants.	)

Before: RYMER, W. FLETCHER, and CLIFTON, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc, filed April 12, 2006.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 03-16030, 05-16126, 05-16336

[Filed March 22, 2006]

KENNETH SLETTEN, an individual and former Trustee of the Navellier Series Fund,

Plaintiff-Appellee,

v.

NAVELLIER SERIES FUND, a Delaware Business Trust; AGGRESSIVE SMALL CAP EQUITY PORTFOLIO OF THE NAVELLIER PERFORMANCE FUNDS, a Delaware Business Trust,

Defendants - Appellants.

KENNETH SLETTEN, an individual and former Trustee of the Navellier Series Fund,

Plaintiff-Appellant,

v.

NAVELLIER SERIES FUND, a Delaware

Business Trust; AGGRESSIVE SMALL CAP EQUITY PORTFOLIO OF THE NAVELLIER PERFORMANCE FUNDS, a Delaware Business Trust,

Defendants - Appellees.

Before: RYMER, W. FLETCHER, and CLIFTON, Circuit Judges.

MEMORANDUM*

Kenneth Sletten served as a trustee for the Navellier Series Fund (the "Fund"). The Fund, joined by several other defendants, appeals the district court's decision awarding indemnification to Sletten for fees and costs he incurred defending a lawsuit the Fund brought against him. Sletten's homeowners' insurance company reimbursed him for most of these expenses. The Fund argues that this reimbursement means that Sletten suffered no indemnifiable loss within the meaning of the applicable indemnification agreements. The agreements, however, do not address the issue of whether Sletten can collect indemnity for expenses covered by a collateral source. Contrary to the Fund's claim, Delaware law allows him to do so under the circumstances in this case. *See State Farm Mutual Auto. Ins. Co. v. Nalbone,* 569 A.2d 71, 75 (Del. 1989). None of the Fund's other arguments requires a different result.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Some of Sletten's expenses were reimbursed by insurance provided by the Fund's one-time investment advisor. The district court refused to award Sletten indemnification for these expenses, and he appeals. We agree with the district court that, because this insurance ultimately came from the Fund, Sletten cannot seek to recover twice for the fees and costs it covered. *See Nalbone,* 569 A.2d at 75.

The Fund also appeals the district court's May 2003 order freezing $2.7 million of its assets to ensure that it would not become judgment-proof. Although the district court has vacated this order, the appeal is not moot; the Fund may have a claim against Sletten's injunction bond. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 315, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999). Because Sletten's claim sounds in law, and because the district court froze the Fund's assets before the entry of final judgment, the injunction was in error. *Id.* at 330, 333. On remand, the Fund may seek damages. We point out, however, that the harm that would support an award of damages is not immediately apparent to us.

The district court's decisions that are the subject of Appeals Nos. 05-16126 and 05-16336 are **AFFIRMED** in all respects. The district court's decision to impose an pre-judgment asset freeze, which the Fund contested in Appeal No. 03-16030, is **VACATED** and **REMANDED** for further proceedings consistent with this disposition.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-N-00-0167-LRH-VPC

[Filed May 26, 2005]

KENNETH SLETTEN, an individual and former Trustee of The Navellier Series Fund,

Plaintiff,

v.

THE NAVELLIER SERIES FUND, a Delaware Business Trust; and THE AGGRESSIVE SMALL CAP EQUITY PORTFOLIO of the NAVELLIER PERFORMANCE FUNDS, a Delaware Business Trust, and DOES 1 - 20,

Defendants.

ORDER

Presently before the Court is Plaintiff Kenneth Sletten's ("Plaintiff") Notice of Motion and Motion for Entry of Comprehensive Final Judgment (Docket Nos. 307 & 308). Defendants have filed an opposition (Docket No. 313), to

which Plaintiff subsequently replied (Docket No. 318). An additional matter before the Court is a motion to enjoin Plaintiff and the Office of the Sheriff of Washoe County, brought by Defendants (Docket No. 319). Plaintiff has filed an opposition (Docket No. 320), to which Defendants filed a reply brief (Docket No. 323). Upon review of the record and relevant law, the Court makes the following disposition:

The majority of the lengthy factual background and procedural history of this case prior to August 27, 2001, is explained by the Ninth Circuit in *Navellier v. Sletten,* 262 F.3d 923 (9th Cir. 2001), *cert. denied sub nom., McLachlan v. Simon,* 536 U.S. 941,122 S. Ct. 2623, 153 L. Ed. 2d 806 (2002). Subsequently, on September 17, 2002, the issue before this Court was whether Plaintiffs were entitled to indemnity for attorneys fees and costs incurred in their successful defense of the underlying case.[1] Because the *Sletten* case raised the same factual and legal issues as another case, *Simon v. Navellier Series Fund,* CV-N-00-0584-LRH (RAM), the Court issued an order resolving the pending motions for summary judgment on the matter, which had been brought by Plaintiffs Simon and Sletten in their respective cases. (Docket No. 140.) Finding that there was no genuine issue of material fact, this Court granted summary judgment in favor of the Plaintiffs and against Defendants, and judgment in accordance was entered September 18, 2002. (Docket No. 141). At this time, however, counterclaims alleged by the Defendants,

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[1] By "underlying case," the Court refers to *Navellier v. Sletten,* 262 F.3d 923 (9th Cir. 2001), *cert. denied sub nom., McLachlan v. Simon,* 536 U.S. 941,122 S. Ct. 2623, 153 L. Ed. 2d 806 (2002), and all related trial court and appellate litigation. The underlying case is now final given the United States Supreme Court's denial of the petition for rehearing on August 26, 2002. Simon and Sletten are the prevailing parties in the underlying case.

which had been added to the case in October 2001, remained unchallenged by Sletten and were not addressed by the Court. The alleged counterclaims each concerned various reasons (such as breach of contract, fraud, misrepresentation, unjust enrichment, and abuse of process) why Sletten was not entitled to recover under the indemnity agreement at issue in Plaintiff's motion for summary judgment. Many of these arguments were touched upon by the Court in its September 17, 2002 grant of summary judgment to Sletten, in which it found Sletten entitled to indemnification under the agreement.

Consequently, in a March 11, 2003 order filed in the consolidated *Sletten/Simon* proceedings, in which this Court considered Plaintiff Simon's pending motion to dismiss the Defendants' counterclaims against Simon, the Court noted: "...the Court's decision granting summary judgment in favor of the Plaintiff eviscerated Defendants' counterclaims." (Order, Docket No. 183, 8: Accordingly, Defendants' counterclaims will be dismissed." (Docket No. 183 at 8:4-7). Like the claims against Sletten, the Court noted that "[v]irtually all of Defendants' counterclaims against Plaintiff Simon were premised upon the contention that he had no right of indemnification. ... As a result of the Court's ruling on Summary Judgment, all of the counterclaims asserted by Defendants are significantly affected." *(Id.* at 3:1-8).

Although the counterclaims alleged by Defendants against Simon were sufficiently identical to those claims alleged against Sletten, the claims were not disposed of at the time because no motion for summary judgment on the claims ever came before the Court. As a result, when several issues were appealed in the *Sletten* case, the Ninth Circuit found that it was unable to hear the matter, and remanded the case to this Court "for the resolution of the counterclaims, of the

Navellier Series Funds ..." (Pl.'s Mot, Ex. A at 2).[2] Consequently, Plaintiff has brought the instant Motion for Entry of Comprehensive Final Judgment, asking that this Court rule in accordance with its previous decisions in this case, and dismiss Defendants' counterclaims and enter final judgment.

Defendants primarily argue in opposition that a default judgment should be entered in favor of the Navellier Series Funds on the counterclaims filed, due to Plaintiff's failure to file an answer to the counterclaims. Under Federal Rule of Civil Procedure 12, a party is required to serve an answer within 20 days after being served with the summons and complaint. As explained by another District Court:

> Under Federal Rule of Civil Procedure 55, the Court may enter a default judgment against a defendant who has failed to file an answer or motion to dismiss within twenty days from the date the complaint was filed, or within such additional time as the Court has granted. The default rule serves to protect a diligent party "lest he be faced with interminable delay and continued uncertainty as to his rights." 10 Charles A.

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[2] "The Court... hereby dismisses Appeal Nos. 03-16304, 03-16475 and 03-16656 for lack of jurisdiction and remands them to the district court for the resolution of the counterclaims of Navellier Series Funds and such other issues as the district court may wish to resolve in aid of the entry of a comprehensive final judgment in these matters. The district court is encouraged to make these determinations promptly. Appeal No. 03-16030 is stayed pending the district court's action, and the Clerk is instructed to calendar any resulting appeal with No. 03-16030 on the earliest available calendar." *(Id.)*

> Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure: Civil § 2681, at 402 (2d ed. 1983). Plaintiff has applied for a default judgment. Federal Rule of Civil Procedure 55(b)(2) authorizes the Court to enter such a judgment against a defendant against whom default has been entered, assuming the defendant is not an infant, incompetent person, or the United States .... The rule also provides that the Court may order whatever hearings or documentation are necessary to establish damages, or fairly consider any other matter.

Brooks v. U.S., 29 F. Supp. 2d 613, 616 (N.D. Cal. 1998) (citing Fed. R. Civ. P. 55(b)). *See also* Fed. R. Civ. P. 55(d).[3] The rule is not without means of relief, however, as "Rule 55(c) allows a court to set aside a default for good cause shown." *Katzir's Floor and Home Design, Inc. v. M-MLS.com,* 394 F.3d 1143, 1148 (9th Cir. 2004). Under subsection (c), the "good cause" analysis used in determining whether to vacate an entry of default concerns three factors: "(1) whether [the party] engaged in culpable conduct that led to the default; (2) whether [the party] had a meritorious defense; or (3) whether reopening the default judgment would prejudice [the opposing party]." *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.,* 375 F.3d 922, 925 (9th Cir. 2004).

Defendants assert that they are entitled to an entry of default pursuant to Rule 55(b), due to Plaintiff's failure to file

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[3]"The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c)." Fed. R. Civ. P. 55(d).

an answer to their counterclaims, and Defendants have filed an application for default with this Court, which is still pending (Docket No. 311). The Court, however, is reluctant to enter a default which it would be compelled to promptly set aside, and it is clear that good cause would exist to set aside such a default. First, the Court finds any culpable conduct on the part of Plaintiff arises merely to the level of excusable neglect. *See id.* (noting that the "excusable neglect" standard is one that "largely overlaps with the issue of culpability"). Defendants' counterclaims were filed subsequent to Plaintiff's filing of a motion for summary judgment on the indemnity issue, and the counterclaims strictly dealt with various defenses to Plaintiffs indemnity claim. Those defenses were largely dealt with by the Court in its order disposing of the indemnity issue. Soon after, identical counterclaims brought by Defendants against Plaintiff Simon were dismissed in an order in which this Court recognized that the claims had been resolved by the previous motion for summary judgment. Given the history of the concurrent proceedings regarding the indemnity issues, the Court will tolerate Plaintiff's failure to realize that Defendants' counterclaims remained unresolved in the *Sletten* case. The Court finds excusable neglect, and must therefore necessarily find good cause to overlook any culpability on the part of Plaintiff, as the "good cause" standard required under Federal Rule 55(c) is "less rigorous than excusable neglect." *Speiser, Krause & Madole P.C. v. Ortiz,* 271 F.3d 884 (9th Cir. 2001).

As noted by the Court on several occasions in this and in previous orders, Defendants' counterclaims have previously been resolved by this Court's finding that Plaintiff was entitled to indemnity. Therefore, with regard to the second and third aspects of the good cause analysis, the Court finds both a meritorious defense to the Defendants' counterclaims, and a lack of prejudice to Defendants in refusing to enter a

default. The Court is entitled, for "good cause," to *sua sponte* set aside an entry of default, *see, e.g., Anheuser Busch, Inc. v. Philpot,* 317 F.3d 1264, 1267 (11th Cir. 2003), U.S. *ex rel. Dattola v. National Treasury Emp. Union,* 86 F.R.D. 496, 500 (D.C. Pa. 1980), and finds that, if it were to enter the default requested by Defendants, it would be obliged to do so almost immediately. Other district courts have refrained from entering a default which would be promptly set aside under Federal Rule 55(c),[4] and this Court now joins their ranks. Consequently, Defendants' argument pertaining to default is insufficient to cause this Court to deny Plaintiff's motion for a comprehensive judgment.

However, Defendants' contention that a comprehensive judgment is not appropriate due to the continued viability of Defendants' counterclaims warrants consideration. As is clear from the record, the counterclaims were not disposed of through summary judgment, as no summary judgment motion was ever before the Court; nor is there any motion for summary judgment currently before the Court. Although Plaintiff has proposed that this Court may dispose of the counterclaims through the "law of the case doctrine," the Court finds that the cases cited by Plaintiff do not actually support this Court taking such an action.[5] And, while Plaintiff

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[4] *Floors-N-More, Inc. v. Freight Liquidators*, 142 F. Supp. 2d 496, 503 (S.D.N.Y. 2001); *National Trust Co. v. American Home Assurance Co.*, 1987 WL 5837, *3 (S.D.N.Y. Jan. 22, 1987); *Macri v. Yamauchi,* 2002 WL 390223, *2 (N.D.Ill. 2002).

[5] Rather, the cases cited by Plaintiff state that an appellate court has jurisdiction to hear appeals even where all claims have not been decided, if it is clear, based on the legal decisions made by the district court, that application of the legal issues and facts determined during that case would in actuality resolve all

proposes the Court simply amend it's previous judgment to dispose of the counterclaims, Defendants assert that summary judgment cannot be granted on the Court's own initiative, where no pending motion is before it.

Indeed, ordinarily courts do not enter summary judgement on a claim *sua sponte* unless notice has been given to the parties. *See, e.g., In re Harris Pine Mills,* 44 F.3d 1431, 1438 (9th Cir. 1995). As explained by the Ninth Circuit,

> *Sua sponte* entry of summary judgment is proper if there is no genuine dispute respecting a material fact essential to the proof of movant's case .... However, a litigant must be given reasonable notice that the sufficiency of his or her claim will be in issue .... Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment.

O'Keefe v. Van Boening, 82 F.3d 322, 324 (9th Cir. 1996) (internal quotations omitted). However, "[a] district court may grant summary judgment without notice if the losing party has had a full and fair opportunity to ventilate the issues involved in the motion." *Harris,* 44 F.3d at 1438 (citing *United States v. Grayson,* 879 F.2d 620, 625 (9th Cir. 1989)). *See also Germaine Music v. Universal Songs of Polygram,* 275 F. Supp. 2d 1288, 1293 (D. Nev. 2003) (noting that although the party's "assertion is not a formal motion for summary judgment, this Court still has the authority to sua

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outstanding claims. (Pl.'s Reply at 3:19-24) (citing *Montes v. United States,* 37 F. 3d 1347, 1349 (9th Cir. 1994); *Federarl Ins. Co. v. Scarsella Brothers, Inc.,* 931 F.2d 599, 601; *Disabled Rights Action Committee v. Las Vegas Events, Inc.,* 375 F.3d 861, 869 (9th Cir. 2004)).

sponte grant summary judgment to [the party] if it is appropriate"); *Cool Fuel, Inc. v. Connett,* 685 F.2d 309, 312 (9th Cir. 1982) (holding that "the moving party against whom summary judgment was rendered [must have] had a full and fair opportunity to ventilate the issues involved in the motion").

At this stage in the litigation, Defendants have not only been put on notice by Plaintiff's motion for entry of judgment that the merit of Defendants' counterclaims is under consideration, but Defendants have also fully briefed this Court in its opposition, which sets forth twenty-four pages of argument concerning the indemnity issue and related counterclaims. Within these pages, Defendants contend that the counterclaims should not be dismissed because Sletten is barred by the doctrines of res judicata or collateral estoppel from pursuing any claims for indemnity in this action, and that Sletten has no contractual right to indemnity from the Navellier Funds. The Court notes that it has previously considered Sletten's contractual right to indemnity from the Navellier Funds, and declines to reconsider the issue. As to Defendants' new argument concerning res judicata and collateral estoppel, these defenses have been waived. *See Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (holding that an untimely assertion of a res judicata or collateral estoppel defense may be raised only if the delay does not prejudice the plaintiff). Defendants had a full opportunity to litigate any defenses it may have had to the indemnity issue at the time of this Court's consideration of Plaintiff's original motion for summary judgment, and did not do so. At this stage in the litigation, allowing the defenses that the Navellier Funds "now seeks to raise in the guise of counterclaims would undercut the validity of the judgment against [it], and permit [Defendant] to relitigate the case *de novo.*" *Bank of Montreal v. Kough,* 612 F.2d 467, 473 (9th

Cir. 1980). In conclusion, this Court finds that the Defendants' counter-claims have been sufficiently briefed to permit a grant of summary judgment *sua sponte,* and this Court in fact finds that summary judgment is warranted and dismisses those claims.

Next, the Court turns to Defendants' motion to enjoin Plaintiff and the Office of the Sheriff for the County of Washoe from proceeding with Plaintiff's action to enforce payment of the $128,000 in costs awarded in the underlying case (Docket No. 319). Defendants point out that Plaintiff is seeking to recover the $128,000 judgment through this action as well as in the Washoe County Court, and argues that Plaintiffis both forum shopping and attempting to take "two bites at the apple." The Court notes that Defendants have previously filed a motion to enjoin which was nearly identical to the instant motion. At the time, the Court stated: "This Court will not enjoin either the Plaintiff or the state court. Nor will it grant the Plaintiff a double recovery. The Court finds that insufficient grounds have been shown for an injunction." (Pl.'s Decl. in Support of Mot., Docket No. 321, Ex. B at 1:25-2:2). Defendants have provided this Court with no new legal argument or authority as to why an injunction is warranted at this time. Therefore, the Court continues to find insufficient grounds for a grant of Defendants' motion.

It is therefore ORDERED that Summary Judgment shall be granted with regard to Defendants' counterclaims against Plaintiff;

It is further ORDERED that Plaintiff's Motion for Entry of Comprehensive Final Judgment (Docket Nos. 307) is GRANTED.

It is further ORDERED that Defendants' "Application to Take Default of Counter-Defendant Kenneth Sletten" (Docket No. 311) is DENIED.

It is further ORDERED that Defendants' Motion to Strike Plaintiff's Motion for Entry of Comprehensive Final Judgment (Docket No. 314) is DENIED.

It is further ORDERED that Defendants' Motion to Enjoin (Docket No. 319) is DENIED.

As a housekeeping matter, it is further ORDERED that "Defendants' Motion to Strike Portions of Declaration of Ralph Alldredge Dated February 3, 2005" (Docket No. 322) is DENIED as moot.

The clerk is hereby directed to enter a judgment in this action in accordance with this order.

IT IS SO ORDERED.

DATED this 25th day of May, 2005.

/s/
LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
******** DISTRICT OF NEVADA**

CASE NUMBER: CV-N-FIELD(case #)

[Filed May 26, 2005]

Kenneth Sletten,	)
	)
Plaintiff,	)
	)
v.	)
	)
The Navellier Series Fund, et al.,	)
	)
Defendants.	)
	)

JUDGMENT IN A CIVIL CASE

xx **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Summary Judgment shall be granted with regard to Defendants' counterclaims against Plaintiff.

Further ORDERED that Plaintiff's Motion for Entry of Comprehensive Final Judgment (Docket Nos. 3071) is GRANTED.

Further ORDERED that Defendants' Application to Take Default of Counter-Defendant Kenneth Sletten (Docket No. 311) is DENIED.

Further ORDERED that Defendants' Motion to Strike Plaintiffs Motion for Entry of Comprehensive Final Judgment (Docket No. 314) is DENIED.

Further Ordered that Defendants' Motion to Enjoin (Docket No. 319) is DENIED as moot.

As a housekeeping matter, it is further ORDERED that Defendants' Motion to Strike Portions of Declaration of Ralph Alldredge Dated February 3, 2005 (Docket No. 322) is DENIED as moot.

The clerk is hereby directed to enter a judgment in this action in accordance with this order.

May 26, 2005

LANCE S. WILSON
Clerk

JerryRies
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Nos. CV-N-00-167-LRH(VPC)/
CV-N-00-0584-LRH(RAM)

[Filed September 17, 2002]

KENNETH SLETTEN, an individual and former Trustee of The Navellier Series Fund,

Plaintiff,

v.

THE NAVELLIER SERIES FUND, a Delaware Business Trust; and THE AGGRESSIVE SMALL CAP EQUITY PORTFOLIO of the NAVELLIER PERFORMANCE FUNDS, a Delaware Business Trust, and DOES 1-20,

Defendants.

DONALD SIMON, an individual and former Trustee of The Navellier Series Fund,

Plaintiff,

v.

THE NAVELLIER SERIES FUND, a Delaware Business Trust; and THE AGGRESSIVE SMALL CAP EQUITY PORTFOLIO of the NAVELLIER PERFORMANCE FUNDS, a Delaware Business Trust, and DOES 1-20,

Defendants.

ORDER

Before the Court are Plaintiff's Motion for Summary Judgment (Docket #76) and Defendants' Motion for Summary Judgment (#105) in *Sletten v. Navellier Series Fund*, CV-N-00-0167-LRH(VPC). The Court is also presented with Plaintiff's Motion for Summary Judgment (#64) and Defendants' Motion for Summary Judgment (#68) in *Simon v. Navellier Series Fund*, CV-N-00-0584-LRH(RAM). Because both the *Sletten* and *Simon* cases raise the same factual and legal issues in each of their respective Motions for Summary Judgment, the Court requested oral argument in both cases on May 3, 2002, and now issues this Order resolving the pending motions in both cases.

A motion for summary judgment is a procedure which terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Cir. P. 56(c). A summary judgment motion may be made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Id.*

The movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to

designate "'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Cir. P 56(e)). Thus, in order to preclude a grant of summary judgment, the non-moving party must set forth "'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Cir. P. 56(e)). The substantive law defines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the non-moving party. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (citing *Zenith Radio Corp.*, 475 U.S. at 587).

The factual background and procedural history of this case are familiar to the parties and are explained by the Ninth Circuit in *Navellier v. Sletten*, 262 F.3d 923 (9th Cir. 2001), *cert. denied sub nom., McLachlan v. Simon*, - U.S. - ,122 S.Ct. 2623 (June 24, 2002). The issue that remains for this Court to resolve is: are Plaintiffs entitled to indemnity for attorneys fees and costs incurred in their successful defense of the underlying case[1].

Plaintiffs allege that two documents and a Delaware statute entitle them to indemnification for attorneys fees and costs in the underlying case and in the present case. The first written

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[1] By "underlying case", the court is referring to *Navellier v. Sletten*, 262 F.3d 923 (9th Cir. 2001), *cert. denied sub nom., McLachlan v. Simon*, - U.S. -, 122 S.Ct. 2623 (June 24, 2002), and all related trial court and appellate litigation. The underlying case is now final given the United States Supreme Court's denial of the petition for rehearing on August 26, 2002. Simon and Sletten are the prevailing parties in the underlying case.

document, the Declaration of Trust provides, in pertinent part, that:

> [T]he Trust shall indemnify each of its Trustees . . . against all liabilities and expenses (including amounts paid in satisfaction of judgments, in compromise, as fines and penalties, and as counsel fees) reasonably incurred by him in connection with the defense or disposition of any action, suit or other proceeding, whether civil or criminal, in which he may be involved or with which he may be threatened, while in office or thereafter, by reason of his being or been a trustee ....

(Declaration of Trust of the Navellier Series Fund (May 6, 1993), § 10.02. Likewise, the second document, the Trust Indemnification Agreement which was also executed on May 6, 1993, provides that the:

> Trustee shall not be liable to the Fund, or any of the Fund's investors, for any error of judgment or mistake of law or fact, for any act or omission by Trustee or for any losses sustained by the Fund, or the Fund's investors. The Fund agrees to indemnify and hold harmless Trustee against any claim made by any of the Fund's investors for any error in judgment or mistake in law or fact, for anv act or omission by Trustee, or for any losses sustained by Trustee or the Fund's investors except to the extent that the Trustee had engaged in willful malfeasance, bad faith, gross negligence, or reckless disregard of his obligations.

As a Delaware business trust and because the Declaration of Trust contains a choice of law provision selecting the law of Delaware, the Fund is governed by Delaware law. The Court

concludes that it must apply Delaware law. Delaware law imposes a mandatory obligation to indemnify a corporate officer or director for all expenses incurred in successfully defending himself against claims arising from his service as an officer or director:

> To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding . . . or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually or reasonably incurred by such person in connection therewith.

8 Del. C. § 145(c).

Plaintiff claims that there is no dispute as to any material fact necessary to Plaintiffs right to indemnity under either the Declaration of Trust, the Trustee Indemnification Agreement or the Delaware indemnification statute. Defendant, however, claims that the Indemnification Agreement was entered into under fraudulent circumstances and that the Agreements are ambiguous but presents no evidence to support this contention.[2] Defendants further allege that the Delaware statute applies only to corporate officers and directors and not to fund trustees.

However, the core of Defendant's opposition to Plaintiffs' Motions for Summary Judgment and its own Motions for Summary Judgment is that Plaintiff cannot be indemnified for

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[2] Significantly, the Defendants drafted the Agreements and should be bound by their terms.

amounts that Plaintiffs did not pay - and here Plaintiffs' attorneys fees and costs were bourne largely by insurance companies.[3] To counter this argument Plaintiffs cite *Chamison v. Healthtrust, Inc.*, 735 A.2d 912 (Del Ch. 1999). In *Chamison*, the court found that where more than one party has an obligation to indemnify, the court should apply principals of contribution. *Id.*, 735 A.2d at 925-26. The court further concluded that where one party paid fees and the other refused, it was reasonable to impose the cost of bringing the indemnification suit on the refusing party. *Id.*, at 927. Following *Chamison*, this Court concludes that under the Declaration of Trust and the Fund Indemnification Agreement, Plaintiffs are entitled to indemnification for attorneys fees and costs incurred in the underlying litigation and in the present actions seeking indemnification even though most of those fees and costs have been paid by Plaintiffs' insurance carriers. Because the Court finds that the Declaration of Trust and the Fund Indemnification Agreement require indemnification, the Court does not determine whether 8 Del. C. § 145(c) applies to Fund Trustees and therefore does not apply section 145(c) for the purpose of determining Plaintiffs' entitlement to indemnification.

Defendants suggest that this Court follow *Schneider v. Nat'l R.R. Passenger Corp.*, 187 F.2d 132, (2nd Cir. 1993) and *State Farm Mut. Auto Ins. Co. v. Nalbone*, 569 A.2d 71 (Del. 1989) rather than *Chamison*. The Court finds that both *Schneider* and *State Farm* are inapplicable. *Schneider* involved a tort under Connecticut law and not contractual

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[3] The Court finds that Defendants argument that the securities acts somehow prohibit indemnification of a fund director or that Plaintiffs will reap a windfall is without merit. See SEC's statement in Release No. IC-11330, Sept. 2, 1980.

indemnity while *State Farm* involved Delaware's no fault insurance scheme.

The Court finds that language of the Trust Declaration Agreement and the Trust Indemnification Agreement both provide a right of indemnification for amounts paid by the Trustee rather than by the Fund. However, one problem for Plaintiff Trustees is that, essentially, the Fund is entitled to credit for most of Mr. Simon's fees and costs and some portion of Mr. Sletten's. At oral argument the court was advised that during the period when M.F.S. was the investment advisor to the Fund, M.F.S. provided D & O coverage to the Fund's Trustees[4]. Because the Fund compensated M.F.S. for serving as the Fund's investment advisor, the Fund essentially paid for the insurance coverage that M.F.S. then provided to Mr. Simon. (Transcript of May 3, 2002, oral argument at 13:18-24). Consequently, while the Fund, through Mr. Navellier, may have permitted the D & O coverage to lapse during the period in which he was hired as the investment advisor, M.F.S. provided D & O coverage to Plaintiffs and, therefore, the Fund is entitled to credit for fees and costs paid to or on behalf of Plaintiffs by the M.F.S. insurance carrier(s). Plaintiffs are, therefore, not entitled to indemnification for the legal expenses paid on their behalf by the M.F.S. insurance carrier(s).

In conclusion, the Court finds there exists no genuine issue of material fact that prevents Plaintiffs from prevailing on their motions for summary judgment seeking indemnity. The Court therefore GRANTS summary judgment in favor of Simon and Sletten (#64 in CV-N-00-0584 and #76 in CV-N-

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[4] M.F.S. was the Fund's investment advisor for a period while the Plaintiffs were trustees of the Fund.

00-0167) and DENIES Defendants' motions for summary judgment. (#68 in CV-N-00-0584 and #105 in CV-N-00-0167) . Plaintiffs shall prepare affidavits in conformity with Local Rule 54-16 outlining their claims for fees and costs that were not paid as a result of insurance provided by M.F.S.

IT IS SO ORDERED.

DATED: September 17th, 2002

/s/
Larry R. HICKS
United States District Judge

APPENDIX F

Excerpts

DECLARATION OF TRUST
OF
THE NAVELLIER SERIES FUND

DATED May ___, 1993

[72]

to redress any breach of trust) except for his own bad faith, willful misfeasance, gross negligence, or reckless disregard of his duties.

INDEMNIFICATION OF TRUSTEES, OFFICERS, EMPLOYEES, AGENTS

Section 10.02. The trust shall indemnify each of its Trustees, officers, employees, and agents (including Persons who serve at its request as directors, officers, or trustees of another organization in which it has any interest, as a shareholder, creditor, or otherwise) against all liabilities and expenses (including amounts paid in satisfaction of judgments, in compromise, as fines and penalties, and as counsel fees) reasonably incurred by him in connection with the defense or disposition of any action, suit, or other proceeding, whether civil or criminal, in which he may be involved or with which he may be threatened, while in office or thereafter, by reason of his being or having been such a Trustee, officer, employee, or agent, except with respect to any matter as to which he

shall have been adjudicated to have acted in bad faith, willful misfeasance, gross negligence, or reckless disregard of his duties; provided, however, that as to any matter disposed of by a compromise payment by such Person, pursuant to a consent decree or otherwise, no indemnification either for said payment or for any other expenses shall be provided unless there has been a determination that such Person did not engage in bad faith, willful misfeasance, gross negligence, or reckless disregard of the duties involved in the conduct of his office by the court or other body approving the settlement or other disposition or by a reasonable determination, based upon review of readily available facts (as opposed to a full trial-type inquiry), that he did not engage in such conduct by written opinion from independent legal counsel approved by the Trustees. The rights accruing to any Person under these provisions shall not exclude any other right to which he may be lawfully entitled; provided that no Person may satisfy any right of indemnity or reimbursement granted herein or in Section 10.01 or to which he may

[82]

USE OF THE WORD "NAVELLIER"

Section 11.10. Louis G. Navellier ("Navellier") has consented to, and granted a non-exclusive license for, the use by any Series or by the Trust of the identifying word "Navellier" in the name of any Series or of the Trust. Such consent is subject to revocation by Navellier in its discretion, if Navellier or any entity owned or controlled by Louis Navellier or subsidiary or affiliate thereof is not employed as the investment adviser of each Series of the Trust. As between the Trust and Navellier, Navellier controls the use of the name of the Trust insofar as such name contains the identifying word "Navellier." Navellier may, from time to

time, use the identifying word "Navellier" in other connections and for other purposes, including, without limitation, in the names of other investment companies, corporations, or businesses which it may manage, advise, sponsor, or own, or in which it may have a financial interest. Navellier may require the Trust or any Series thereof to cease using the identifying word "Navellier" in the name of the Trust or any Series thereof if the Trust or any Series thereof ceases to employ Navellier or a subsidiary or affiliate thereof as investment adviser.

PROVISIONS IN CONFLICT WITH LAW

SECTION 11.11. The provisions of this Trust Instrument are severable, and if the Trustees shall determine, with the advice of counsel, that any of such provisions are in conflict with the 1940 Act, the regulated investment company provisions of the Internal Revenue Code, or with other applicable laws and regulations, the conflicting provision shall be deemed never to have constituted a part of this Trust Instrument; provided, however, that such determination shall not affect any of the remaining provisions of this Trust Instrument, or render invalid or improper any action taken or omitted prior to such determination. If any provision of this Trust Instrument shall be held invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall attach only to such provision in such jurisdiction and shall not in any manner affect such provisions in any other jurisdiction or any other provision of this Trust Instrument in any jurisdiction.

IN WITNESS WHEREOF, the undersigned, being all of the initial Trustees of the Trust, have executed this instrument this 6th day of May, 1993

/s/ _____
Louis G. Navellier, as Trustee
and not individually.

/s/ _____
John Drinkwater, as Trustee
and not individually

/s/ _____
Donald Simon, as Trustee
and not individually

/s/ _____
Lawrence Bianchi, as Trustee
and not individually

/s/ _____
Kenneth Sletten, as Trustee
and not individually

APPENDIX G

TRUSTEE INDEMNIFICATION AGREEMENT

In consideration of Kenneth Sletten ("Trustee"), acting as a trustee of The Navellier Series Fund (the "Fund"), pursuant to a Declaration of Trust dated May 6, 1993, the Fund and Trustee agree as follows: Trustee will use his best efforts in performing his Trustee obligations, but in the absence of willful misfeasance, bad faith, gross negligence, or reckless disregard of his obligations, Trustee shall not be liable to the Fund, or any of the Fund's investors, for any error of judgment or mistake of law or fact, for any act or omission by Trustee or for any losses sustained by the Fund, or the Fund's investors. The Fund agrees to indemnify and hold harmless Trustee against any claim by any of the Fund's investors for any error of judgment or mistake of law or fact, for any act or omission by Trustee, or for any losses sustained by the Trustee or the Fund's investors except to the extent that the Trustee has engaged in willful misfeasance, bad faith, gross negligence, or reckless disregard of his obligations. Anything contained in this Agreement notwithstanding, Trustee shall not be relieved of any liability or be indemnified for any loss of which Trustee would not be permitted to be indemnified under the Federal Securities Laws.

This Agreement may be amended from time to time by written agreement signed by all of the parties; provided, that such amendment shall be approved both by the vote of a majority of Trustees of the Fund, including a majority of Trustees who are not interested person of the Trustee to this Agreement (other than as Trustees of the Fund) cast in person

at a meeting called for that purpose, and by the holders of a majority (as defined in the Act) of the outstanding voting securities of the Fund to which this Agreement is applicable.

This Agreement may be amended by agreement of the parties without the vote or consent of the shareholders of the Fund to supply any omission, to cure, correct, or supplement any ambiguous, defective, or inconsistent provision hereof, or if they deem it necessary to conform this Agreement to the requirements of applicable federal and/or state laws or regulations, but neither the Fund nor the Trustee shall be liable for failing to do so.

In the event of any litigation or disagreement between the parties regarding the subject of this indemnification, the prevailing party shall, in addition to any other relief, be paid its reasonable attorneys' fees and costs as determined by the court or trier of fact hearing said dispute. The parties agree that any litigation arising out of this indemnification shall only be brought and heard and shall only be venued in a federal or state court in Reno, Nevada.

THE NAVELLIER SERIES FUND

Dated as of May ___, 1993

By:/s/_____
Louis Navellier, Trustee

By:/s/_____
John Drinkwater, Trustee

By:/s/_____
Lawrence Bianchi, Trustee

By:/s/_____
Donald Simon, Trustee

ACCEPTED AND AGREED

By:/s/_____
Kenneth Sletten, Trustee

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-N-00-0167-HDM-PHA

[Filed March 30, 2000]

KENNETH SLETTEN, an individual and former Trustee of The Navellier Series Fund,	)
Plaintiff,	)
v.	)
THE NAVELLIER SERIES FUND; a Delaware Business Trust; and THE AGGRESSIVE SMALL CAP EQUITY PORTFOLIO of the NAVELLIER PERFORMANCE FUNDS, a Delaware Business Trust,	)
Defendants.	)

COMPLAINT FOR INDEMNITY AND FOR DECLARATORY AND INJUNCTIVE RELIEF

JURY DEMAND

Plaintiff Kenneth Sletten alleges as follows:

JURISDICTION AND VENUE

1. Plaintiff and defendants are citizens of different states and the amount in controversy herein exceeds $75,000, exclusive of interest and costs. Therefore, this Court has subject matter jurisdiction over the claims asserted herein pursuant to 28 U.S.C. § 1332 (Diversity). The Court also has jurisdiction of this matter under 28 U.S.C. § 1331 (Federal Question), because plaintiff's claims arise from his service as an independent trustee of an investment company under the Investment Company Act of 1940. Venue is proper in the unofficial Northern district of this Court pursuant to the terms of the indemnification agreement upon which this Action is based.

PARTIES

2. Plaintiff, Kenneth Sletten ("Mr. Sletten"), is an individual and former trustee of the Navellier Series Fund. He is a resident of Woodside, California.

3. Defendant, The Navellier Series Fund (the "Fund"), is a Delaware Business Trust registered under the Investment Company Act of 1940. The principal place of business for the Fund is Reno, Nevada.

4. Defendant, Aggressive Small Cap Equity Portfolio of The Navellier Performance Fund ("NPF"), is successor-in-interest to the Fund and is also a Delaware Business Trust registered under the Investment Company Act of 1940. Its principal place of business is also Reno, Nevada.

FIRST CLAIM

(Contractual Indemnification Against The Fund and NPF)

5. On May 6, 1993, Mr. Sletten and the other trustees of the Fund executed a Declaration of Trust ("Declaration of Trust") which organized the Fund and described the terms and conditions for its operation. Section 10.02 of the Declaration of Trust provides:

> The Trust shall indemnify each of its Trustees, officers, employees, and agents... against all liabilities and expenses (including amounts paid in satisfaction of judgments, in compromise, as fines and penalties, and as counsel fees) reasonably incurred by him in connection with the defense or disposition of any action, suit, or other proceeding, whether civil or criminal, in which he may be threatened, while in office or thereafter, by reason of his being or having been such a Trustee, officer, employee, or agent, except with regard to any matter as to which he shall have been adjudicated to have acted in bad faith, willful misfeasance, gross negligence or reckless disregard of his duties.

The Declaration of Trust is attached to this Complaint as Exhibit A.

6. Also on May 6, 1993, Mr. Sletten and the other trustees entered into a separate Trustee Indemnification Agreement (the "Indemnification Agreement"), predicated on the Declaration of Trust, which provides that in consideration of Mr. Sletten acting as a trustee:

> The Fund agrees to indemnify and hold harmless Trustee (Sletten) against any claim by any of the Fund's investors for any error of judgment or mistake of law or fact, for any act or omission by trustee, or for any losses sustained by the Trustee or the Fund's investors except to the extent that the Trustee has engaged in willful misfeasance, bad faith, gross negligence, or reckless disregard of his obligations.

The Indemnification Agreement is attached to this Complaint as Exhibit B.

7. Although Plaintiff alleges both of these contracts as bases for liability, he previously filed a similar complaint in the United States District Court for the Northern District of California, alleging only the Declaration of Trust as the basis for liability. That Court, upon a motion to dismiss for improper venue, determined that both agreements necessarily govern the relationship of the parties. As a result, the more specific Indemnification Agreement -- which required the action to be brought in federal court in Reno, Nevada– mandated the venue of the Action. Accordingly, plaintiff is filing this complaint in the forum selected by defendants. A copy of the Court's Memorandum Decision and Order, Orrick, J., dated March 10, 2000, is attached as Exhibit C.

8. Navellier Management, Inc ("NMI") is a closely held corporation that formerly served as investment advisor to the Fund, and currently serves as investment advisor to NPF.

9. Louis Navellier ("Navellier") is an individual, founder and former interested trustee of the Fund. Navellier has also been an "interested" trustee of the NPF since it began operation and purports to be the sole owner of NMI.

10. Between May 15, 1993 and July 14, 1997, Mr. Sletten acted as an Independent Trustee of the Fund. One of his duties as an Independent Trastee was to consider, and if appropriate, renew the Investment Advisory Agreement with NMI, on an annual basis.

11. On or about March 13, 1997, after NMI resigned as advisor to the Fund, the Independent Trustees decided not to renew the Investment Advisory Agreement, thus ending the tenure of NMI (and Navellier as NMI's alter ego) as advisor. In or about April 1997, Mr. Navellier and Alan Alpers, the other interested trustee of the Fund, were removed from their positions as trustees of the Fund by a majority vote of the other trustees.

12. In April 1997, Mr. Navellier and Mr. Alpers filed an action in the United States District Court for the Northern District of California (Case No. 97-1258 WHO) for injunctive relief and damages against Mr. Sletten and the other independent trustees (the "Action").

13. Also in April 1997, Mr. Sletten made a demand to the Fund that the Fund indemnify him in the Action and that the Fund advance payment for counsel fees and costs incurred in connection with his defense of the Action.

14. In April 1997, the Fund agreed to make advance payments for attorneys' fees and costs incurred in defense of the Action.

15. On July 14, 1997, Mr. Sletten gave a written undertaking to reimburse the Fund for any expenses advanced to him in the event that there was a subsequent adjudication that he had engaged in bad faith, willful misfeasance, gross

negligence, or reckless disregard of his duties as a trustee and was not entitled to indemnification.

16. Between April 1997 and July 14, 1997, the Fund made advance payments for attorneys' fees and costs incurred in defense of the Action.

17. Mr. Sletten and the other Independent Trustees of the Fund resigned on July 14,1997. They were replaced by Jacques Delacroix, Barry Sander and Joel Rossman. Each of those new trustees was a personal friend of the defendants' attorney, Mr. Samuel Kornhauser, who has also served as counsel to the Fund during most of the time that NMI was the investment advisor. Mr. Kornhauser has also represented Mr. Navellier and NMI since NMI was formed. Thereafter, despite the absence of any adjudication or other determination that Sletten was not entitled to indemnification by reason of bad faith, willful misfeasance, gross negligence or reckless disregard of his duties, the Fund refused to make any further payments for attorneys' fees and costs incurred in defense of the Action,

18. On February 23,1998, Mr. Navellier and NMI along with Rosemary J. McLachlan, Martin Billett, William and Faith Rauthenberg, Thomas and Gail Sullivan and Mark Schultz filed a First Amended Class Action Complaint in the Action (the "Amended Complaint"). The Amended Complaint named as defendants, among others, Mr. Sletten and the other Independent Trustees of the Fund. The Amended Complaint alleged that the defendants had 1) breached their fiduciary duties to the shareholders of the Fund under Delaware law and the Investment Company Act of 1940; 2) committed corporate waste; and 3) intentionally interfered with NMI's prospective economic advantage. Each of those claims was predicated on an allegation of Mr. Sletten's bad faith, willful

misfeasance, gross negligence or reckless disregard ofhis duties as a Trustee.

19. All of the claims made in the Action arose from decisions made and actions taken by Mr. Sletten in his capacity as a trustee to the Fund.

20. In April 1998, the Independent Trustees, including Mr. Sletten, renewed their request for indemnification under the Trust Agreement and a related Indemnification Agreement.

21. In or about June 1998, the Fund was merged into the NPF as the Aggressive Small Cap Equity Portfolio. From July 11, 1997 until the merger, the same persons served as trustees of the Fund and the NPF. The NPF has repeatedly acknowledged its assumption of the liabilities of the Fund, including liability for any indemnity payments ultimately due to Mr. Sletten. Such acknowledgments have been made publicly, in the NSF Prospectus and to this Court, in NMI and the Fund's Opposition to Defendants' Motion for Leave to Amend their Cross-Complaint, which the court denied, based in part upon such acknowledgments.

22. On June 16, 1999, NMI's claims for interference with prospective economic advantage were dismissed on summary judgment.

23. Beginning on June 21, 1999, the remaining claims against Mr. Slerten were tried before a jury in the United States District Court for the Northern District of California, the Honorable William H. Orrick, presiding.

24. On July 21, 1999, the jury returned a unanimous verdict for the defense, necessarily finding that Mr. Sletten

had not engaged in bad faith, willful misfeasance, gross negligence, reckless disregard or any other breach of his fiduciary duties.

25. In a letter to counsel for NPF and the Fund dated August 23, 1999, Mr. Sletten again requested payment and indemnification for his expenses incurred in connection with the Action, as provided in the Declaration of Trust and the Indemnification Agreement. Mr. Sletten also reaffirmed his willingness to repay any amounts paid to him if an appeal resulted in a new trial and a subsequent adjudication of bad faith, willful misfeasance, gross negligence or reckless disregard of his duties. No response was ever received. In an Order dated October 20, 1999, the Court denied Navellier's post-trial motions and the Action is currently on appeal to the Ninth Circuit Court of Appeals.

26. Mr. Sletten has paid more than $1.5 million in legal fees and other expenses in connection with his defense of the Action and his efforts to obtain indemnification from the Fund pursuant to the Declaration of Trust and the Indemnification Agreement. He has incurred and will continue to incur such expenses until the Action is finally resolved and he has received full indemnification. Under the Declaration of Trust and the Indemnification Agreement, Mr. Sletten is entitled to indemnification during the pendency of any action against him in addition to his right to full indemnification at the conclusion of such an action.

27. Under the express terms of the Indemnification Agreement, plaintiff is entitled to its reasonable attorneys' fees in pursuing this action:

> In the event of any litigation or disagreement between the parties regarding the subject matter of this

indemnification, the prevailing party shall, in addition to any other relief, be paid its reasonable attorneys" fees and costs as determined by the court or trier of fact hearing said dispute. (Exhibit B, p.2)

SECOND CLAIM

(Declaratory and Injunctive Relief Against The Fund and NPF)

28. Mr. Sletten realleges and incorporates herein by reference Paragraph 1 through 27 above as though fully set forth herein.

29. Mr. Sletten has sought ongoing indemnification payments under the Declaration of Trust and the Indemnification Agreement on three separate occasions.

30. Despite a written request following judgment in Mr. Sletten's favor in the Action Defendants have issued no direct response to that most recent request. However, counsel for Defendants has publicly stated that Mr. Sletten has no right to indemnification.

31. A currant dispute now exists between Mr. Sletten on one hand and the Fund and NPF on the other, regarding the Fund and NPF's obligation to pay expenses incurred by Mr. Sletten in connection with the Action.

32. Mr. Sletten requests a declaration from the Court that, under the Declaration of Trust and the Indemnification Agreement, the Fund is obligated to pay Mr. Sletten for his expenses incurred in connection with the Action and an injunction requiring defendants to indemnify Mr. Sletten

pendente lite for his expenses in successfully defending against the Action.

WHEREFORE, Plaintiff Sletten prays as follows:

1. For a preliminary injunction enjoining the Board of Trustees of the Navellier Performance Fund from refusing to indemnify Mr. Sletten based upon a claim that he acted in bad faith, willful misfeasance, gross negligence or reckless disregard of his duties at any time during his tenure as a trustee of the Navellier Series Fund or thereafter;

2. For a declaration that Sletten is entitled to indemnificatinn from the Navellier Series Fund and the Aggressive Small Cap Portfolio of the Navellier Performance Funds for all expenses reasonably incurred by him in connection with his defense of the action entitled *McLachlan v. Simon* Case No. C-97-1258 WHO, and his efforts to obtain indemnification.

3. For a judgment requiring Defendants to pay all of Plaintiff's costs and expenses incurred in connection with the Action and in this proceeding to enforce Plaintiff's right to indemnification.

4. For reasonable attorneys' fees and costs pursuant to the express terms of the Indemnification Agreement.

5. For such further relief as the Court deems appropriate.

Dated: March 21, 2000.

LEGAL STRATEGIES GROUP

By /s/
RALPH C. ALLDREDGE
Attorneys for Plaintiff
KENNETH SLETTEN

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure section 38 and District of Nevada Civil Local Rule 38-1, plaintiff, Kenneth Sletten, hereby demands trial by jury in this action.

Dated: March 21, 2000

LEGAL STRATEGIES GROUP

By /s/_____
Attorneys for Plaintiff
KENNETH SLETTEN

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-N-00-0167-LDG-VPC

[Filed October 11, 2001]

KENNETH SLETTEN, an individual and former Trustee of The Navellier Series Fund,	)
Plaintiff,	)
v.	)
THE NAVELLIER SERIES FUND, a Delaware Business Trust; and THE AGGRESSIVE SMALL CAP EQUITY PORTOLIO of the Navellier PERFORMANCE FUNDS, a Delaware Business Trust,	)
Defendants.	)

[PROPOSED] AMENDED ANSWER AND COUNTERCLAIM

Defendants, The Navellier Series Fund ("the Fund") and The Aggressive Small Cap Equity Portfolio of The Navellier Performance Funds ("NPF"), amend their answer and counterclaim as follows:

JURISDICTION AND VENUE

1. Admit that this Court has subject matter jurisdiction, deny federal question jurisdiction and admit that venue is proper in this Court.

PARTIES

2. Admit.

3. Admit.

4. Admit.

FIRST CLAIM
(Contractual Indemnification Against The Fund and NPF)

5. Admit that Mr. Sletten and other Trustees executed the Declaration of Trust, admit that Section 10:02 contains the language provided and that a copy of the Declaration of Trust is attached to the Complaint as Exhibit A; deny all other allegations.

6. Admit that Mr. Sletten and the other Trustees also entered into a Trustee Indemnification Agreement, admit that the Trustee Indemnification Agreement contains the language quoted and that a copy of the Trustee Indemnification Agreement is attached to the Complaint as Exhibit B; deny all other allegations.

7. Admit Plaintiff previously filed an indemnification action in the Northern District of California, that the Court dismissed for improper venue and that a copy of that Court's Memorandum Decision and Order is attached to the Complaint as Exhibit C, are without knowledge as to why

Plaintiff filed this action or why he filed here and therefore deny those and all other allegations.

8. Admit.

9. Admit that Mr. Navellier is an individual, founder and former interested trustee of the Fund and has been an interested Trustee of NPF since it began operation and is the sole owner of Navellier Management, Inc. ("NMI").

10. Admit that Mr. Sletten acted as a Trustee of the Fund from May 15, 1993 through July 14, 1997, deny that he acted as an independent trustee but rather acted for his own interests, admit one of his duties was to renew, if appropriate, the Investment Advisory Agreement, deny that he properly exercised that duty but rather, breached that duty by refusing to properly renew the Investment Advisory Agreement.

11. Deny that NMI resigned as advisor to the Fund but rather, NMI was improperly terminated by Plaintiff and others, deny that Mr. Navellier was the alter ego of NMI, deny that a proper majority of the Trustees of the Fund voted to remove Mr. Navellier and Mr. Alpers as Trustees, deny all other allegations.

12. Admit that Mr. Alpers and Mr. Navellier filed an action for injunctive relief in Case No. 97-1258-WHO in April 1997. Deny all other allegations.

13. Admit that Mr. Sletten purported to make a demand for indemnification, deny that his demand was proper or that he was or is entitled to indemnification, deny all other allegations.

14. Deny that there was any proper agreement by the Fund to advance attorneys fees and costs, deny all other allegations and further allege that any payment or purported authorization for payment of fees and costs was improper and invalid.

15. Defendants are without sufficient information or knowledge of the allegations and therefore deny such allegations.

16. Defendants are without information or knowledge of the allegations and therefore deny such allegations. Moreover, if such payments were made, they were improper and without valid authority.

17. Admit that Mr. Sletten and other Trustees resigned on July 14, 1997, admit they were replaced by Barry Sander Jacques Delacroix and Joel Rossman, admit that each was a friend of Samuel Kornhauser and that Mr. Kornhauser served as counsel to the Fund and to Mr. Navellier and NMI, and that such allegations are irrelevant. Deny all other allegations and specifically that the Fund had any obligation to indemnify Sletten or make any payments for attorneys fees or costs in defense of the action.

18. Admit all allegations except that each of the claims was predicated on an allegation of Mr. Sletten's bad faith, willful malfeasance, gross negligence or reckless disregard of his duties as a Trustee, which allegation is denied.

19. Deny all allegations.

20. Defendants are without information and therefore deny such allegations and any such request was invalid and Mr. Sletten was not entitled to indemnification.

21. Admit that the assets of the Fund were merged into the Aggressive Small Cap Equity Portfolio of The Navellier Performance Funds but deny all other allegations and specifically NPF denied and continues to deny that there is any obligation to indemnify Mr. Sletten.

22. Admit but that such decision was erroneous and is on appeal to the Ninth Circuit Court of Appeal.

23. Admit.

24. Admit that the jury returned a verdict for the defense, deny that such verdict necessarily found that Sletten had not engaged in bad faith, willful malfeasance, gross negligence, reckless disregard or any other breach of his fiduciary duties and, in fact, the jury instructions and other irregularities and errors during the trial caused the jury to reach an improper verdict which decision is presently pending on appeal and which Defendants believe will result in a reversal or a new trial rendering the verdict void.

25. Admit that Mr. Sletten requested payment and indemnification, deny that he was entitled to such indemnification, deny that his purported willingness to repay amounts paid to him was valid or required payments to Mr. Sletten, admit that the trial court denied the Plaintiffs' post-trial motions and that the action is currently on appeal and deny all other allegations.

26. Deny all allegations and in particular that Mr. Sletten has paid any fees or expenses or that he is entitled to any indemnification.

27. Deny all such allegations.

SECOND CLAIM
(Declaratory and Injunctive Relief Against The Fund and NPF)

28. Defendants reallege their responses to Paragraphs 1 through 27 above as though fully set forth herein.

29. Deny such allegations and deny further that Mr. Sletten is entitled to any such indemnification.

30. Admit that counsel for Defendants has told Sletten's counsel and in pleadings that he has no right to indemnification. Deny all other allegations.

31. Deny that a valid, current dispute exists since Mr. Sletten and his counsel know that Mr. Sletten is not entitled to indemnification.

32. Admit that Mr. Sletten has made a request for a declaration from the Court but deny that he is entitled to such declaration or to any indemnification.

AFFIRMATIVE DEFENSES

First Affirmative Defense

33. Plaintiff has failed to state facts sufficient to constitute a cause of action for any relief.

Second Affirmative Defense

34. Plaintiff has not suffered any damages and has not paid any attorneys fees or costs for which he can claim indemnification, i.e. all attorneys fees and costs have been paid by insurance or others.

Third Affirmative Defense

35. Plaintiff's claims for indemnification are barred as against public policy and the purported indemnification agreement and declaration of trust indemnification agreement are invalid, illegal, against public policy and do not provide for and were not intended to provide indemnification where the trustee had his fees and costs paid by insurance or by others.

Fourth Affirmative Defense

36. There is no right to indemnification because there is an appeal pending and it has not been finally established that Mr. Sletten even prevailed or can claim indemnification.

Fifth Affirmative Defense

37. The contractual provision for indemnity in the Trust Agreement and Indemnification Agreement are invalid because they were not entered into by a majority of disinterested trustees of the Fund.

Sixth Affirmative Defense

38. Defendants are entitled to a set off of in excess of two million dollars for expenses and attorneys fees incurred in defending against Mr. Sletten's breach of contract and indemnity claims in the Action which offset any claim for indemnity and which result in Mr. Sletten owing Plaintiffs in excess of two million dollars.

Seventh Affirmative Defense

39. Sletten is barred by his laches and unclean hands.

Eighth Affirmative Defense

40. There is no valid dispute pending.

Ninth Affirmative Defense

41. This action is not ripe for adjudication since there is an appeal pending which could negate Sletten's entire claim. Therefore, this action should, at a minimum, be stayed pending the outcome in the Ninth Circuit Court appeal.

Tenth Affirmative Defense

42. There is no valid agreements as to indemnification since the purported agreements were obtained by fraud, misrepresentation, duress and lack of consideration.

Eleventh Affirmative Defense

43. Plaintiff's Complaint is barred by the Investment Company Act of 1940.

Twelfth Affirmative Defense

44. There was no indemnification agreement formed due to lack of mutuality and the parties did not agree to the same terms, i.e. there was no meeting of the minds as to the circumstances under which the Trustees would be entitled to indemnification.

Thirteenth Affirmative Defense

45. Sletten lacks standing to bring this action because he has suffered no damages, has not paid any attorneys fees and costs and because there has been no final determination

that he was not liable in the Action and there is an appeal pending.

Fourteenth Affirmative Defense

46. Pursuant to provisions of Rule 11 of the Federal Rules of Civil Procedure, at the time of the filing of this Answer, all possible affirmative defenses may not have been alleged inasmuch as insufficient facts and other relevant information may not have been available after reasonable inquiry, and therefore, this answering defendant reserves the right to amend this answer to allege additional affirmative defenses if subsequent investigation warrants the same.

Fifteenth Affirmative Defense

47. Plaintiff's claims are barred by the July 14, 1997 Release he agreed to, releasing all his claims.

Sixteenth Affirmative Defense

48. Plaintiff's construction of the alleged indemnity agreement is incorrect and unconscionable and should be construed as the parties contracted, i.e. that indemnity would apply, if at all, only to reimburse Plaintiff for his actual out-of-pocket losses for which he was not otherwise reimbursed.

COUNTERCLAIMS FOR DAMAGES FOR BREACH OF CONTRACT, TORTIOUS BAD FAITH, CONSPIRACY, FRAUD, NEGLIGENT MISREPRESENTATION, BREACH OF FIDUCIARY DUTY, UNJUST ENRICHMENT, BREACH OF CONTRACT - THIRD PARTY BENEFICIARY AND ABUSE OF PROCESS

Defendants/Counterclaimants, The Navellier Series Fund (the "Fund") and the Small Cap Equity Portfolio of The Navellier Performance Funds ("NPF") counterclaim and allege as follows:

COUNT ONE
(Breach of Contract)

1. Counterdefendant Kenneth Sletten ("Sletten") is and at all times relevant was a resident of Woodside, California.

2. On or about May 6, 1993, Simon, Kenneth Sletten and others as trustees of the Fund entered into a Trust Agreement with the Fund whereby Simon and Sletten agreed to act as trustees of the Fund and to not take any actions which would be detrimental to the Fund.

3. Section 2.08 of the Trust Agreement provided in pertinent part:

> The assets belonging to a particular Series... shall be held by the Trustees in trust for the benefit of the holders of shares of that Series.

4. The Fund was and is a federally regulated mutual fund governed and regulated by federal securities law, including the Investment Company Act of 1940 (the "'40

Act") (15 U.S.C. §80a-1 et seq) and the provisions of the '40 Act were incorporated into the Trust Agreement and the Trust Agreement is governed by the '40 Act.

5. 15 U.S.C. §80a-1(b)(2) and l(b)(margin) which were made part of the Trust Agreement provide:

> the interests of investors are adversely affected- (2) when investment companies are operated... in the interests of directors... rather than in the interest of... such companies' security holders;
>
> It is... the policy and purpose of this title... to mitigate and... eliminate conditions... which adversely affect... the interest of investors.

6. Also made a part of the Trust Agreement was Simon's and Sletten's covenant of good faith and fair dealing whereby Simon and Sletten agreed not to take any action to deprive the Fund of the benefits of its agreement with Simon and Sletten.

7. Sletten breached his contractual duties under the Trust Agreement, under his implied covenant of good faith and under the '40 Act which was incorporated and made a part of the Trust Agreement, by conspiracy with Chubb Insurance Group, Federal Insurance Company, Sletten and others by falsely seeking and pursuing recovery from the Fund as purported "indemnity" for attorneys fees and costs in the *McLachlan* litigation which Sletten never paid and which had been paid for Sletten by Chubb and Federal and others. In breach of his contractual promises to act in the Fund's best interests, Sletten was and has been pursuing and seeking to deprive the Fund of its assets (which Sletten agreed to protect) by bringing an action to recover amounts he knows he is not

owed in order to make an improper windfall profit for himself and for Chubb and Federal. By manipulating and improperly invoking the indemnity provisions of the Trust Agreement (and the Trustee Indemnification Agreement), he has and is acting as a straw man for Chubb and Federal to recover for himself and them, monies that neither he or Chubb or Federal are entitled to recover. Sletten has further breached his contractual duties by improperly invoking the indemnity provisions of the Trust Agreement and Indemnification Agreement so that he can recover (some or all of the amounts he claims) from the Fund and/or NPF on behalf of himself and/or on behalf of Chubb and Federal all of whom have no right or claim in recover from the Fund or NPF the monies Chubb and Federal paid in the *McLachlan* case.

8. As a direct and proximate result of Sletten's breach, the Fund and NPF have been damaged in the amount of attorneys fees and costs they have spent and will spend in responding to Sletten's actions in excess of $100,000 and for the loss of business suffered by counterclaimants as a result of Sletten's bogus claim of "indemnity."

COUNT TWO
(Tortious Bad Faith)

9. Counterclaimants reallege and incorporate paragraphs 1 through 8 of this Counterclaim as though fully set forth herein.

10. Sletten tortiously breached his covenant of good faith and fair dealing and his fiduciary duty to the Fund and its shareholders by conspiring with Chubb and Federal to pursue false "claims" for "indemnity" for amounts he did not pay.

11. As a direct and proximate cause of Sletten's tortious breach of his covenant of good faith and fair dealing, Counterclaimants have been damaged in an amount in excess of $100,000, which amount continues to increase.

12. Sletten's actions were malicious, fraudulent, oppressive, despicable and in conscious disregard of Counterclaimants' rights entitling Counterclaimants to punitive damages.

COUNT THREE
(Conspiracy)

13. Counterclaimants reallege and incorporate paragraphs 1 through 12 of this Counterclaim as though fully set forth herein.

14. Sletten conspired with Chubb, Federal and Simon to defraud Counterclaimants of more than $3.8 million in alleged attorneys fees and costs which Simon and Sletten did not pay as part of Sletten's agreement with Chubb and Federal to obtain for Chubb and Federal some or all of the monies which Chubb and Federal paid to or on behalf of Simon and Sletten as attorneys fees and costs in the *McLachlan* litigation. Counterclaimants are informed and believe that, as part of their plan and agreement, Sletten and Chubb and Federal conspired and agreed that Sletten would file a bogus lawsuit against Counterclaimants in the guise of an "indemnity" claim falsely asserting that Sletten had "incurred" $1.5 million in attorneys fees and costs (which he had never paid and which had been paid on his behalf by Chubb and Federal) and that Sletten would pursue that "claim" in his own name, rather than in the name of Chubb and/or Federal in order to defraud and mislead Counterclaimants and the Court into believing that he had actually been damaged when, in fact, he knew he

had not been damaged. Sletten and Chubb and Federal conspired to bring this false claim in Sletten's name because they knew that Chubb and Federal had no contract or agreement with the Fund or right to obtain reimbursement of the $1.5 million from Counterclaimants. Chubb further knew they had no contract or agreement with or right to seek reimbursement directly from Sletten because Sletten had not been found to be acting willfully or fraudulently or with gross negligence in the underlying *McLachlan* litigation. Since there had been no finding of gross negligence or willfulness against Sletten in the *McLachlan* litigation, Chubb and Federal were contractually bound by their insurance policy to pay Sletten's fees and expenses. Since Chubb and Federal had no valid way to recover the attorneys fees and costs they had paid, they devised a scheme and agreement and conspiracy with Sletten whereby Sletten would pursue his bogus claim for indemnity to recover the attorneys fees and expenses Chubb and Federal had paid. Then, if Sletten could recover, Sletten would transfer some or all of that recovery back to Chubb and Federal in exchange for Chubb and Federal financing (paying) for Sletten to bring the "indemnity" action and sharing part of the recovery with Sletten. Counterclaimants believe Sletten would retain a part any recovery as further compensation for acting as the straw man for the insurers in the "indemnity" action.

15. As a direct and proximate result of Sletten's conspiracy to defraud, Counterclaimants have been damaged and will continue to be damaged by having to pay additional attorneys fees and costs and other detriment (lost business from redemptions by the shareholders of the Fund and NPF due to fear that the Counterclaimants' assets will be subject to the bogus $1.5 million "indemnity" claim) in excess of $100,000.

16. Sletten's actions were wanton, willful, despicable and fraudulent, entitling Counterclaimants to punitive damages.

COUNT FOUR
(Fraud)

17. Counterclaimants reallege and incorporate paragraphs 1 through 16 of this Counterclaim as though fully set forth herein.

18. When Simon, Sletten and Bianchi entered into the Trust Agreement, they represented and promised that they sought an indemnity agreement to provide them with protection against having to be personally liable for their actions as Trustees in the event insurance did not cover their actual liability. Simon, Sletten and Bianchi represented, agreed and promised that indemnity by the Fund (the shareholders' investments) would only be used as a safety net in the event insurance did not cover their actual liability.

19. Those representations were false. The true facts were that Simon and Sletten had no intention of looking only to insurance unless insurance was not enough to cover their actual liability.

20. Simon and Sletten knew that their representations were false, that they had no intention of looking only to insurance and not to the Fund for indemnity except to the extent insurance did not cover their liability, but made these false promises with the intent to induce the Fund to enter into indemnity agreements with Simon and Sletten and the other Trustees.

21. The Fund believed and reasonably relied on these false representations and was thereby induced to enter into the indemnity agreements under which Sletten is seeking to recover a windfall profit at the expense of the Fund shareholders for attorneys fees and costs Sletten did not pay.

22. The Fund reasonably relied on Sletten's promises, representations and actions and entered into the indemnity provisions based on Sletten's false representations.

23. As a direct and proximate cause of Sletten's fraud, Counterclaimants have been required to spend in excess of $100,000 in attorneys fees and costs to defend against Sletten's efforts to improperly take more than $1.5 million in Fund (shareholder) assets from Counterclaimants. In addition, Counterclaimants' business has been damaged as a result of redemptions and lost new investments because of shareholders' and potential investors' fears that the Fund's and NPF's assets will be reduced by millions of dollars due to Sletten's improper "indemnity" claims.

24. Sletten's actions were wanton, willful, despicable, fraudulent and malicious and entitle Counterclaimants to punitive damages.

COUNT FIVE
(Negligent Misrepresentation)

25. Counterclaimants reallege and incorporate paragraphs 1 through 24 of this Counterclaim as though fully set forth herein.

26. Sletten knew or should have known that the Fund would rely on his false representations regarding indemnity as

only a fall back in case insurance did not cover all his liability.

27. As a direct and proximate cause of Sletten's negligence in making the false promises he made, Counterclaimants have been damaged in an amount in excess of $100,000, plus lost business and lost business opportunities.

COUNT SIX
(Breach of Fiduciary Duty)

28. Counterclaimants reallege and incorporate paragraphs 1 through 27 of this Counterclaim as though fully set forth herein.

29. Sletten, as a Trustee, was a fiduciary to Counterclaimants (and their shareholders) with a duty to act in their interests and to not place his interests ahead of those of Counterclaimants and their shareholders. Sletten is pursuing his claim for indemnity as a trustee and fiduciary of Counterclaimants and, in so doing, is breaching his fiduciary duty to Counterclaimants by putting his interests and the interests of Chubb, Federal and Simon ahead of the interests of Counterclaimants and their shareholders. Sletten is breaching his duty of loyalty to act in the Counterclaimants' best interests by attempting to take $1.5 million (or more) from Counterclaimants' assets for his own benefit or for the benefit of Chubb, Federal and Simon for attorneys fees and expenses he did not pay. He is seeking this $1.5 million windfall for himself and for Chubb and for Federal and for Simon.

30. As a direct and proximate cause of his breach of fiduciary duty, Counterclaimants have suffered damages in excess of $100,000 and lost business.

31. Sletten's acts are wanton, willful, fraudulent and despicable and entitle Counterclaimants to punitive damages.

COUNT SEVEN
(Unjust Enrichment)

32. Counterclaimants reallege and incorporate paragraphs 1 through 31 of this Counterclaim as though fully set forth herein.

33. Sletten's actions to recover in excess of $1.5 million from Counterclaimants would result in a windfall and unjust payment to Sletten to which he is not entitled.

34. As a direct and proximate cause of Sletten's actions, Counterclaimants have been damaged in an amount in excess of $100,000 plus lost business in attempting to prevent Sletten from improperly taking or recovering the more than $1.5 million which he is seeking.

COUNT EIGHT
(Breach of Contract - Third Party Beneficiary)

35. Counterclaimants reallege and incorporate paragraphs 1 through 34 of this Counterclaim as though fully set forth herein.

36. On or about March 13, 1997, Simon, Sletten and Mr. Bianchi and the Fund entered into an insurance agreement with Chubb and/or Federal as additional insureds on Massachusetts Financial Services' ("MFS") E&O and D&O

insurance policy, whereby Simon, Sletten, Bianchi and the Fund were added as insureds to Chubb's and/or Federal's insurance policy covering MFS. Under that insurance policy, Chubb and Federal agreed to provide coverage to the Fund and its trustees in the event they were sued in connection with their duties as trustees of the Fund. The Fund was a direct and third party beneficiary of that insurance contract, since it was entered into and intended to cover and benefit the trustees and the Fund and to protect the trustees (including Sletten) and the Fund from liabilities arising from lawsuits which were not the result of gross negligence or willful misconduct by the trustees.

37. Sletten has breached and is breaching and interfering with Counterclaimants' contractual rights as a third party beneficiary by conspiring with and seeking to recover for Chubb and Federal (and himself) over $1.5 million from Counterclaimants. Sletten is trying to force Counterclaimants, rather than Chubb and Federal, to pay for the attorneys fees and costs which Chubb and Federal were contractually bound to pay for the benefit and protection of Counterclaimants. Sletten is trying to deprive Counterclaimants of their third party beneficiary benefits i.e., insurance protection against having to pay such amounts. NFP has succeeded to those third party rights.

38. As a direct and proximate cause of Sletten's and Chubb's and Federal's breach of Counterclaimants' contract and third party contract rights, Counterclaimants have been damaged in excess of $100,000.

COUNT NINE
(Abuse of Process)

39. Counterclaimants reallege and incorporate paragraphs 1 through 38 of this Counterclaim as though fully set forth herein.

40. On March 30, 2000, Sletten filed the bogus Complaint in this action knowing there was no valid basis for the indemnity claims he was asserting. Rather, he filed the Complaint and improperly invoked the legal process of this Court in violation of Nevada law in order to intimidate or force Counterclaimants to pay him, Chubb and Federal monies to reimburse Chubb and Federal for some or all of the monies they had paid as legal fees and costs for Sletten in the *McLachlan* action. Sletten improperly filed and pursued the Complaint even though Sletten, Chubb and Federal knew they were not entitled to any such payments. Sletten's (and Chubb's and Federal's) ulterior motive was to use the threat of a large, $1.5 million claim to coerce Counterclaimants into settling and/or paying money Counterclaimants did not owe in order to avoid the possibility of having to pay Sletten's huge, bogus claim.

41. Sletten also improperly filed the Complaint for the improper purpose or making the bogus indemnity claim public in order to draw media coverage and thereby ruin Counterclaimants' mutual fund business. The intended effect was to use the publicity about Sletten's (and Simon's) huge, bogus "indemnity" claim to scare Counterclaimants' shareholders into redeeming out of Counterclaimants for fear of having their investments reduced by the bogus indemnity claim and to further cause potential investors not to invest in Counterclaimants for fear of having their investment used to pay Sletten's bogus indemnity claim. Sletten's ulterior and

willful purpose was to use the continuation of a huge, bogus lawsuit and adverse publicity generated by its filing to improperly pressure Counterclaimants into an unwarranted settlement or payment to Sletten, Chubb and Federal.

42. As a direct and proximate result of Sletten's, Chubb's and Federal's actions, Counterclaimants have been damaged in an amount in excess of $100,000, plus lost business and business opportunities.

43. Sletten's actions were wanton, willful, malicious and despicable, entitling Counterclaimants to punitive damages.

WHEREFORE, Defendants/Counterclaimants pray as follows:

1. That Plaintiff Sletten take nothing by way of relief requested in his Complaint.

2. That Counterclaimants be awarded damages on each count of their Counterclaim in excess of $100,000, according to proof.

3. That Counterclaimants be awarded punitive damages as to Counts Two, Three, Four, Six and Nine.

4. That Plaintiff Sletten pay Defendants/ Counterclaimants their attorneys fees and costs in this case and in the Action.

5. For such other relief as the Court deems appropriate.

DATED: October 11, 2001

LAW OFFICES OF SAMUEL KORNHAUSER
AND
KERN & ROSENAUER, LTD.

By: /s/
Gayle A. Kern,
Attorneys for Defendants